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?

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ABSTRACT

The Supreme Court of Canada's interpretation of the reasonable steps requirement for the offence of child luring in *R v Morrison* has undermined the law of sexual assault. Appellate courts have applied *Morrison* to sexual assault cases, insisting that the fault element for sexual assault is purely subjective. Accordingly, these courts have held that the accused's failure to take reasonable steps to ascertain consent does not inexorably prove the *mens rea* for sexual assault. This result undermines reforms to sexual assault law, creates needless analytical complexity, and violates the presumption of innocence. All of these deleterious results can be avoided if courts interpret the *mens rea* for sexual assault as a subjective-objective standard of fault. However, *Morrison* stands squarely in the way of this simple solution. The Supreme Court's interpretation of the reasonable steps requirement in *Morrison* cannot be distinguished from the reasonable steps requirement for sexual assault. Furthermore, as a matter of horizontal *stare*

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decisis, the Supreme Court is unlikely to overturn *Morrison* despite its flaws.

INTRODUCTION

This commentary aims to answer the question posed by the Alberta Court of Appeal (ABCA) in *R v Barton:* [1] if the accused is barred from raising the defence of mistaken belief in communicated consent, what must the Crown do to prove the *mens rea* for sexual assault? The Court suggested a simple answer: *Nothing*. The defence of mistaken belief is tightly constrained by the definition of consent, the air of reality test, and section 273.2 of the *Criminal Code*.[2] If the Crown has a distinct obligation to prove *mens rea*[3] when the defence is unavailable, then the trier of fact will always have to consider the defence.[4] This would render the restraints on the defence of mistaken belief illusory.[5] At the time *Barton* was decided by the ABCA, its answer on this point was supported by considerable jurisprudence and academic commentary.[6]

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1 2017 ABCA 216 at para 238 [*Barton ABCA*], rev'd in part (with no direct comment on this point) 2019 SCC 33 [*Barton SCC*].

2 RSC, 1985, c C-46 [*Code*].

3 There are two elements to the *mens rea* for sexual assault: (1) the intention to touch; and (2) knowledge or recklessness regarding the absence of communicated consent. See *R v GF*, 2021 SCC 20 at para 25 [*GF*]; *R v Ewanchuk*, 1999 CanLII 711 at para 42 [*Ewanchuk*]. In this commentary, the phrase "*mens rea* for sexual assault" refers exclusively to the second element: the accused's knowledge or recklessness towards the absence of consent.

4 *Barton ABCA*, *supra* note 1 at para 239. In the alternative, the Court suggested that if the Crown must prove *mens rea* despite the failure of the mistaken belief defence, the trial judge should instruct the jury that it should have "little difficulty" finding that the Crown proved *mens rea*. This idea will be discussed further in Part 2.

5 *Ibid*.

6 For jurisprudence on this point, see *R v Malcom*, 2000 MBCA 77 [*Malcom*]; *R v Cornejo*, 2003 CanLII 26893 (ON CA) [*Cornejo*]; *R v Dippel*, 2011 ABCA 129; *R v George*, 2017 SCC 38 [*George*]. For academic commentary, see Hamish Stewart, *Sexual Offences in Canadian Law* (Toronto: Thomson

Two years later, the Supreme Court answered the question posed by the ABCA in *Barton* for the offence of child luring.[7] However, it provided a radically different answer. In *Morrison* the accused was charged with child luring.[8] He did not take reasonable steps to determine the age of the person he was speaking with.[9] Therefore, he was barred from asserting the defence of mistaken belief in age.[10] Controversially, Justice Moldaver – writing for the majority of the Supreme Court – held that the unavailability of the mistaken belief defence due to Mr. Morrison's failure to take reasonable steps was insufficient to prove *mens rea*.[11] The Crown had to prove that Mr. Morrison *knew* he was speaking with a person under 16 years old.[12] His failure to take reasonable steps did not prove his knowledge regarding age.[13] Mr. Morrison could have been reckless or negligent towards age.[14] These states of mind were insufficient to prove *mens rea*.[15]

Reuters, 2004), looseleaf (Release 33, March 2019) at 3-47, and 4-26.2 to 4-26.3 [*Sexual Offences*]; Hamish Stewart, "Fault and 'Reasonable Steps': The Troubling Implications of *Morrison* and *Barton*" (2019) 24 Can Crim L Rev 379 at 391 ["Reasonable Steps"].

7 R v *Morrison*, 2019 SCC 15 [*Morrison*]. Interestingly, the Supreme Court released its decision in *Barton* SCC, supra note 1, only weeks after *Morrison* without comment on whether *Morrison* impacted the defence of mistaken belief in sexual assault. Some have interpreted this silence as a signal that *Morrison* does not apply to sexual assault, see *R v Angel*, 2019 BCCA 449 at footnote 1 [*Angel*]; Isabel Grant & Janine Benedet, "Unreasonable Steps: Trying to Make Sense of *R. v. Morrison*" (2019), 67 Crim LQ 14 at 8 [Grant & Benedet]. But see also "Reasonable Steps", supra note 6 at 393-95, who argues that the Court's general discussion of reasonable steps in *Barton* SCC is consistent with *Morrison*.

8 *Morrison*, *supra* note 7 at para 22.

9 *Ibid* at para 30.

10 *Code*, *supra* note 2, s 172.1(4).

11 *Morrison*, *supra* note 7 at para 83.

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

In this article, I argue that the Court's reasoning in *Morrison* should not apply to the law of sexual assault. Once the Crown demonstrates that the accused failed to take reasonable steps – which renders the mistake of fact defence unavailable per section 273.2(b) – the Crown has proven *mens rea.*[16] This conclusion rests on a particular view of the *mens rea* for sexual assault: the *mens rea* is not purely subjective. The accused's failure to take reasonable steps does not merely bar the defence of mistaken belief. It also proves *mens rea*. This concept of *mens rea* has been expressed variously as a "blended subjective-objective fault standard"[17] and the "failure to reasonably advert."[18] Justice Abella endorsed this articulation of *mens rea* for the offence of child luring in her dissenting judgment in *Morrison.*[19]

My argument in favour of a subjective-objective *mens rea* for sexual assault proceeds in four stages. First, I analyze the Court's reasoning in *Morrison,* focusing on Justices Moldaver and Abella's differing interpretations of section 172.1(4) – the reasonable steps requirement for the offence of child luring – and the ensuing implications for *mens rea*. Second, I consider two cases that have applied Justice Moldaver's judgement in *Morrison* to the offence of sexual assault – *R v MacIntyre*[20] and *R v HW*.[21] Third, I summarize three criticisms of *Morrison* and examine whether adopting a subjective-objective *mens rea* responds to these criticisms. After considering the Court's application of *Morrison* in *MacIntyre* and *HW,* I conclude that some criticisms of *Morrison* are overstated. Nevertheless, there are compelling reasons to adopt a subjective-objective standard of fault. Finally, I consider whether *Morrison* has

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16 See Hamish Stewart, "The Fault Element of Sexual Assault" (2022) 70 Crim LQ 4 at 11-12 ["The Fault Element"].

17 See Kent Roach, *Criminal Law*, 8th ed (Toronto: Irwin Law, 2022) at 515. The failure to take reasonable steps is not purely objective because it is based on "the circumstances known to the accused at the time" per s 273.2(b).

18 See Stewart, "The Fault Element", supra note 16 at 11.

19 *Morrison*, *supra* note 7 at paras 209-14.

20 2019 CACM 3 [*MacIntyre*].

21 2022 ONCA 15 [*HW*].

precluded the Supreme Court from adopting a subjective-objective *mens rea* for sexual assault as a matter of *stare decisis*. I find that distinguishing or overturning *Morrison* will be an exceedingly challenging task. Accordingly, legislative amendment is probably necessary for a subjective-objective *mens rea* to prevail.

I. THE COURT'S INTERPRETATION OF REASONABLE STEPS AND MISTAKEN BELIEF IN *MORRISON*

In *Morrison,* Douglas Morrison posted an advertisement on the "Casual Encounters" section of Craigslist titled "Daddy looking for his little girl".[22] A police officer responded to Morrison's ad, posing as a 14-year-old girl named "Mia".[23] "Mia" repeatedly represented herself to Morrison as being 14-years-old.[24] Despite these representations, Morrison invited "Mia" to touch herself sexually and proposed they meet to engage in sexual activity.[25]

Morrison was charged with luring a child per section 172.1(1)(b) of the *Code*. Section 172.1(1)(b) proscribes communication with a person "who the accused *believes* is" under the age of 16 years for the purpose of committing a sexual offence against a young person.[26] Significantly, section 172.1(3) deems this belief to exist if – absent evidence to the contrary – the person the accused is speaking with represents themselves as being under 16.[27] Furthermore, section 172.1(4) precludes the accused from asserting a mistaken belief in age unless he[28] took reasonable steps

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22 *Morrison*, *supra* note 7 at para 17.

23 *Ibid* at para 18.

24 *Ibid* at para 19.

25 *Ibid*.

26 *Code, supra* note 2, s 172.1(1)(b). Emphasis added.

27 *Ibid*, s 172.1(3).

28 Throughout this commentary, I intentionally use the pronoun "he" whenever referring to the singular, abstract "the accused". This usage reflects that fact that sexual offences are profoundly gendered crimes committed almost exclusively by men.

to determine that person's age.[29] Morrison argued that sections 172.1(3) and (4) of the *Code* violated sections 11(d) and 7 of the *Canadian Charter of Rights and Freedoms*,[30] respectively.[31]

The Supreme Court unanimously held that 172.1(3) violated section 11(d) of the *Charter*.[32] The presumption of innocence was violated because there is no inexorable connection between a belief in age and a representation regarding age.[33] The internet is riddled with deception, so the accused may not always believe the representation.[34] However, the Supreme Court divided on the correct interpretation and constitutionality of section 172.1(4).[35] Morrison argued that section 172.1(4) violates section 7 of the *Charter* because it allowed him to be convicted for mere negligence.[36] Writing for the majority of the Court on this point, Justice Moldaver was "very doubtful" that the stigma and punishment for the offence of child luring were sufficiently serious to require a purely subjective standard of fault.[37] However, he found it unnecessary to definitively resolve this issue because

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29 *Code*, *supra* note 2, s 172.1(4).

30 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

31 *Morrison*, *supra* note 7 at para 38, footnote 2.

32 *Ibid* at paras 60, 161, 208.

33 *Ibid* at paras 52, 57, citing *R v Whyte*, 1988 CanLII 87 at 18-19 (SCC); *R v Downey*, 1992 CanLII 109 at 29-30 (SCC); *R v Audet*, 1996 CanLII 198 at para 44 (SCC).

34 *Morrison*, *supra* note 7 at paras 57-58. Although there is no analogous provision to s 172.1(3) for the offence of sexual assault, this reasoning has important implications regarding the constitutionality of s 273.2(*b*). I will return to this issue in Part 3(c).

35 *Ibid* at paras 80, 161, 208.

36 *Ibid* at para 80. Significantly, in *Morrison*, the accused did not argue that s 172.1(4) violated s 11(d) of the *Charter*. In Part 3(c), I explore whether s 273.2(b)—a highly analogous provision to s 172.1(4)—violates s 11(d).

37 *Ibid* at para 79. The Ontario Court of Appeal made a very similar remark regarding s 273.2(b) in *R v Darrach*, 1998 CanLII 1648 (ON CA), 1998 CarswellOnt 648 at para 85 (cited to Carswell), aff'd on other grounds 2000 SCC 46.

section 172.1(4) does not prescribe a fault element.[38] It merely limits the mistake of age defence.[39]

The offence of child luring expressly requires the accused to *believe* that he is communicating with someone under 16-years-old.[40] The presumption of belief per section 172.1(3) reinforces this clear language.[41] Put simply, the *mens rea* for child luring is the accused's knowledge that he is communicating with an individual under age 16.[42] This articulation of *mens rea* is not altered by section 172.1(4).[43] Section 172.1(4) merely bars the trier of fact from considering the defence of mistaken belief in age.[44] If section 172.1(4) prescribed *mens rea*, then the presumption of knowledge per section 172.1(3) would be unnecessary.[45] The Crown would never need to prove knowledge because it could prove the less demanding standard of a failure to take reasonable steps.[46] Furthermore, the language of section 172.1(4) itself is clear on this point.[47] The opening words of section 172.1(4) are "[i]t is not a defence".[48] The failure of a defence does not provide a freestanding basis for conviction.[49] The Crown must always prove every element of an offence beyond a reasonable doubt.[50]

However, the failure of the mistaken belief defence has important implications regarding the Crown's *ability* to prove the *mens rea* of belief. If the defence of mistaken belief fails, then the trier of fact is precluded from considering evidence supporting a

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38 *Ibid* at paras 79-80.

39 *Ibid*.

40 *Ibid* at para 81, citing *Code*, *supra* note 2, s 172.1(1)(b).

41 *Morrison*, *supra* note 7 at para 81.

42 *Ibid* at para 83.

43 *Ibid* at para 82.

44 *Ibid*.

45 *Ibid* at para 84.

46 *Ibid*.

47 *Ibid* at para 82.

48 *Ibid* at paras 82, 124, citing *Code*, *supra* note 2, s 172.1(4).

49 *Ibid* at paras 85, 124.

50 *Ibid*.

mistaken belief in age.[51] This preclusion of evidence makes it far easier for the Crown to prove *mens rea*.[52] However, it does not *automatically* prove *mens rea*.[53] Despite the failure of the mistake of age defence, the Crown may only be able to prove that the accused was reckless or negligent regarding age.[54] These states of mind do not satisfy the *mens rea* for child luring.[55]

Dissenting on this point, Justice Abella disagreed with Justice Moldaver's interpretation of section 172.1(4).[56] The Crown can prove the *mens rea* for child luring through two avenues: (1) showing that the accused *believed* he was communicating with someone under 16 (subjective path to liability); or (2) showing that the accused *failed to take reasonable steps* to determine the complainant's age (objective path to liability).[57] Courts have repeatedly endorsed the objective path to liability for analogous reasonable steps requirements in the *Code*.[58]

Furthermore, this interpretation of 172.1(4) is not precluded by language in the *Code* describing it as a precondition to the "defence" of mistaken belief in age.[59] Mistake of fact is not a true

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51 *Ibid* at paras 120, 128, 130.

52 *Ibid* at paras 88-89. Moldaver J made this point while clarifying the Court's earlier decision in *R v George*, *supra* note 6. According to Moldaver J, in *George*, the failure of the mistaken belief in age defence did not *automatically* prove *mens rea* regarding age; however, as a practical matter, the failure of the defence made proof of *mens rea* "a virtual certainty" (paras 88-89).

53 *Morrison*, *supra* note 7 at para 131.

54 *Ibid.*

55 *Ibid.*

56 *Ibid* at para 195. However, she went on to state that s 172.1(4) violated the accused's right to make full answer and defence per s 7 of the *Charter* because any evidence of reasonable steps is necessarily inculpatory for the offence of child luring. I have omitted Abella J's reasons on this point because they have no relevance to the offence of sexual assault.

57 *Ibid* at para 214.

58 *Ibid* at paras 212-14, citing *R v Darrach* (1998), 38 OR (3d) 1 (CA) at 24-25, aff'd on other grounds 2000 SCC 46; *Malcom*, *supra* note 6 at para 13; *Cornejo*, *supra* note 6 at paras 19, 30-34; *George*, *supra* note 6 at paras 7-8.

59 *Morrison*, *supra* note 7 at paras 209, 214, citing *Code*, *supra* note 2, s 172.1(4).

"defence".[60] It is a means for the accused to generate a reasonable doubt about *mens rea*.[61] Accordingly, any conditions on the availability of the "defence" necessarily affect *mens rea*: "subjective *mens rea* may be negated by an honest mistake, while objective *mens rea* may only be negated by an honest *and* reasonable mistake".[62] Therefore, conditioning the availability of the defence upon the accused taking reasonable steps in the circumstances known to him at the time necessarily implies that the *mens rea* for child luring is "subjective-objective".[63]

II. The Application of *Morrison* to Sexual Assault in *MacIntyre* and *HW*

A. *MacIntyre*

Shortly after the Supreme Court decided *Morrison*, the Court Martial Appeal Court applied *Morrison* to the offence of sexual assault in *MacIntyre*.[64] In *MacIntyre,* the jury heard diametrically opposed testimony on the issue of consent.[65] The complainant stated that she awoke to MacIntyre touching her genitals.[66] She repeatedly pushed his hand away from her and said "no".[67] He persisted and proceeded to vaginally penetrate her.[68] MacIntyre testified to a completely different version of events. He claimed

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60 *Ibid* at para 209.

61 *Ibid.*

62 *Ibid.*

63 *Ibid* at para 210.

64 *MacIntyre*, supra note 20.

65 *Ibid* at paras 7-19. The term "diametrically opposed testimony" comes from *Sexual Offences*, *supra* note 6 at 3-31, where the author explains that the air of reality threshold for the defence of mistaken belief is almost never satisfied when the trier of fact hears contradictory testimony from the complainant and the accused. This issue will be explored in detail in Part 3(b).

66 *MacIntyre*, *supra* note 20 at para 8.

67 *Ibid.*

68 *Ibid* at para 9.

that the accused invited him to her room and was an enthusiastic participant in vaginal intercourse.[69]

The military judge refused to leave the defence of honest belief in communicated consent with the jury because it lacked an air of reality.[70] Despite this decision, the judge instructed the jury that it had to determine whether MacIntyre was reckless towards the complainant's lack of consent.[71] He further instructed the jury that it should have "no difficulty concluding" that the accused was reckless if it accepted either of the following facts: (1) the complainant said "no" while pushing the accused's hand away; or (2) the accused entered the complainant's room uninvited.[72] The jury returned a verdict of not guilty.[73]

On appeal, the Crown argued that the military judge erred in his instructions to the jury.[74] Once the military judge determined that the mistaken belief in communicated consent defence lacked an air of reality, the Crown did not have to prove recklessness regarding the absence of consent.[75] The Appeal Court rejected this argument because it was contrary to binding authority.[76] The Supreme Court has repeatedly stated that the *mens rea* for sexual assault has two elements: (1) intention to touch; and (2) knowledge or recklessness regarding the absence of consent.[77] The second fault element exists regardless of whether the mistaken belief in

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69 *Ibid* at para 18.

70 *Ibid* at para 20. For an explanation of this decision, see *Sexual Offences*, *supra* note 6.

71 *Ibid*. In this paragraph, the Court describes the fault element regarding the absence of consent as "knowledge" but defines knowledge as "knowledge, willful blindness or recklessness". To avoid confusion, I will describe the *mens rea* by its minimum, recklessness.

72 *Ibid*.

73 *Ibid*.

74 *Ibid* at para 23.

75 *Ibid.*

76 *Ibid* at paras 32-45.

77 *Ibid*, citing *R v Ewanchuk*, *supra* note 3 at paras 23, 30, 41-44, 46-49, 51-52; *R v Handy*, 2002 SCC 56 at paras 118-

19; *R v JA*, 2011 SCC 28 at para 24; *Barton* SCC, *supra* note 1 at para 87.

communicated consent defence has an air of reality.[78] The Crown always bears the burden of proving that the accused was at least reckless towards the absence of consent.[79]

However, the Crown argued that this characterization of fault cannot be correct because recklessness towards the absence of consent and the defence of mistaken belief are mirror images.[80] Therefore – when the defence of mistaken belief lacks an air of reality – instructing the jury to consider whether the Crown has proven recklessness allows the jury to indirectly consider the unavailable defence of mistaken belief.[81] The Appeal Court rejected this argument for three reasons.

First, the defence of mistaken belief and recklessness are not mirror images.[82] An accused who did not believe that the complainant consented did not *necessarily* appreciate a risk of non-consent. An accused could have "no belief about the complainant's consent" through no fault of his own.[83] For example, an accused could fail to turn his mind to whether the complainant consented because he was involuntarily intoxicated.[84]

Second, the Crown's argument is inconsistent with Justice Moldaver's reasoning in *Morrison*.[85] There is no principled basis to distinguish section 273.2(b) from section 172.1(4).[86] Both provisions preclude the trier of fact from considering the defence of mistaken belief unless the accused takes reasonable steps.[87]

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78 *MacIntyre*, *supra* note 20 at para 46. For a different interpretation of the Supreme Court's articulation of fault, see Paul Alexander & Kelly De Luca, "The *Mens Rea* of Sexual Assault: How Jury Instructions are Getting it Wrong" (2019), 42:3 Man LJ 39.

79 *MacIntyre*, *supra* note 20 at para 46.

80 *Ibid.*

81 *Ibid*. See also *Barton ABCA*, *supra* note 1 at paras 238-39.

82 *MacIntyre*, *supra* note 20 at para 65.

83 *Ibid*, emphasis original.

84 *Ibid* at paras 65-66.

85 *Ibid* at paras 52.

86 *Ibid* at paras 52-54.

87 *Ibid* at para 53.

Furthermore, both offences have subjective *mens rea*.[88] The absence of an analogous provision to section 172.1(3) – the evidentiary presumption of belief that Justice Moldaver relied upon when deciding that knowledge was the exclusive means for the Crown to prove *mens rea* – is an insufficient basis to conclude that section 273.2(b) provides an alternative path for the Crown to prove *mens rea*.[89] The core of Justice Moldaver's reasoning is that the reasonable steps requirement bars a defence and cannot prove an essential element of an offence.[90] This reasoning is equally applicable to section 273.2(b).[91]

Third, if the defence of mistaken belief is unavailable, proper jury instructions preclude the jury from considering evidence of mistaken belief when determining whether the Crown has proven *mens rea*.[92] The trial judge would err if they instructed the jury to consider evidence of mistaken belief in its deliberations regarding *mens rea*.[93] Such an instruction would improperly introduce the defence of mistaken belief "by the back door".[94] In this case, the military judge gave the proper instruction.[95]

The military judge told the jury that it should have "no difficulty" finding that MacIntyre was reckless if it believed the complainant's testimony on either of the following points: (1) MacIntyre came into her room uninvited; or (2) she said "no" while pushing MacIntyre's hand away.[96] Furthermore, although the military judge instructed the jury to consider "all the evidence" when determining whether MacIntyre was reckless, the military

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88 *Ibid.*

89 *Ibid* at para 54.

90 *Ibid.*

91 *Ibid.*

92 *Ibid* at para 67.

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 *Ibid*, citing *Barton ABCA*, *supra* note 1 at footnote 105, where the Court of Appeal recommended this type of limiting instruction if the jury needed to be instructed on *mens rea* despite the failure of the mistaken belief defence.

judge also recognized that the jury had almost certainly rejected all of MacIntyre's evidence by the time it considered *mens rea*.[97] Otherwise, it would not have concluded that the Crown had proven the *actus reus* of non-consent beyond a reasonable doubt.[98]

B. *HW*

In *HW*, the Ontario Court of Appeal followed the Court's approach in *MacIntyre*, applying *Morrison* to a sexual assault case.[99] Even though the defence of mistaken belief was unavailable to the accused because it lacked an air of reality, the trial judge instructed the jury to determine whether HW was reckless regarding the absence of consent.[100] The trial judge did not err by instructing the jury on *mens rea*.[101] This instruction was necessary in light of the Supreme Court's decision in *Morrison*.[102]

However, unlike the military judge in *MacIntyre*, the trial judge did not provide a limiting instruction to the jury.[103] This omission was a legal error.[104] The trial judge instructed the jury to consider "all of the evidence" when determining whether HW was reckless regarding the absence of consent.[105] This instruction permitted the jury to consider the unavailable defence of mistaken belief because "all of the evidence" included HW's testimony regarding the complainant's behaviour.[106] Problematically, HW testified that the complainant smiled, made eye contact and initiated oral sex.[107]

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97 *MacIntyre*, *supra* note 20 at para 67.

98 *Ibid.*

99 *HW*, *supra* note 21.

100 *Ibid* at para 26.

101 *Ibid* at para 82.

102 *Ibid* at paras 58-60, 68-73, 79-81.

103 *Ibid* at para 27.

104 *Ibid* at para 87.

105 *Ibid* at para 99.

106 *Ibid* at paras 100-02.

107 *Ibid* at para 99.

This evidence was relevant to a claim of mistaken belief.[108] Therefore, the trial judge erred by failing to instruct the jury to ignore this evidence when determining whether HW behaved recklessly.[109]

III. A Subjective-Objective Mens Rea Resolves Morrison's Flaws

Academic commentators have been highly critical of the Supreme Court's reasoning in *Morrison*. They have identified three primary problems with the Supreme Court's interpretation of reasonable steps: (1) it undermines the policy rationale animating the reasonable steps provisions in the *Code*;[110] (2) it makes the *mens rea* analysis exceedingly complicated;[111] and (3) it causes the reasonable steps requirement to violate the presumption of innocence.[112] In response to these criticisms, Stewart recommends adopting a subjective-objective fault element, which he refers to as the "failure to reasonably advert to consent".[113] Although I find the first two problems to be somewhat overstated, these criticisms pose a serious concern. Adopting a subjective-objective standard of *mens rea* provides a legitimate solution.

A. *Morrison* Undermines the Policy Rationale Animating Reasonable Steps Provisions

Shortly after the Supreme Court released *Morrison*, Janine Benedet and Isabel Grant argued that *Morrison* rendered the

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108 *Ibid* at para 100.

109 *Ibid* at paras 102-03, 105-07.

110 See Grant & Benedet, *supra* note 7 at 7-11; Stewart, "Reasonable Steps", *supra* note 6 at 386-87, 389- 97; "The Fault Element", *supra* note 16 at 1-4.

111 See "Reasonable Steps", *supra* note 6 at 395-97; Stewart, "The Fault Element", *supra* note 16 at 8.

112 See "Reasonable Steps", *supra* note 6 at 397-400.

113 "The Fault Element", *supra* note 16 at 11.

reasonable steps requirement "irrelevant to the verdict".[114] If the Crown must always prove the accused's belief regarding age – regardless of whether the accused took reasonable steps – then there are no limits on the defence of mistaken belief.[115] The trier of fact will always consider evidence of mistaken belief when determining whether the Crown has proven *mens rea*.[116] This result completely undermines the purpose of reasonable steps requirements: to limit the number of situations where the accused can assert the defence of mistaken belief.[117]

However, this concern is overstated. In *Morrison,* Justice Moldaver explained that the trial judge must ensure that the jury does not consider evidence of mistaken belief when determining whether the Crown has proved *mens rea*.[118] The Courts followed this approach in *MacIntyre* and *HW.* In *MacIntyre,* the trial judge provided a "little difficulty" instruction and directed the jury to only consider evidence unrelated to the defence of mistaken belief.[119] More dramatically, in *HW*, the Court of Appeal ordered a new trial after the judge permitted the jury to consider evidence of mistaken belief when the defence lacked an air of reality.[120] Evidently, the reasonable steps requirement continues to impact verdicts.

Despite this overstatement, a conceptual problem remains: the acquittal of an accused who never turns his mind to the issue of consent.[121] If the *mens rea* for sexual assault is recklessness, then an

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114 Grant & Benedet, *supra* note 7 at 8, citing *Code*, *supra* note 2, s 172.1(4).

115 *Ibid* at 7-8. See also *Barton ABCA*, *supra* note 1 at paras 238-39.

116 Grant & Benedet, *supra* note 7 at 7-8.

117 *Ibid* at 7.

118 *Morrison*, *supra* note 7 at paras 120, 128, 130.

119 *MacIntyre*, *supra* note 20 at para 20. But see Don Stuart, "*R. v. H.W.*: Applying *Morrison* to Fault for Sexual Assault Brings Unworkable Complexity" (2022) 77 CR (7th) 272, who describes this instruction as a "startling departure from the long established position that the trial judge's duty is to direct the jury on the law to apply but not how they should conclude" [Stuart].

120 *HW*, *supra* note 21 at paras 102-03, 105-07

121 See Michael Plaxton, "Sexual Assault's Strangely Intractable Fault Problem" (2022) 70 CLQ 33 at 3-5 [Plaxton]; "The Fault Element", *supra* note 16;

accused who never adverts to consent must be acquitted.[122] As a practical matter, an acquittal on this basis is extremely unlikely for two related reasons. First, it would be exceedingly difficult for an accused to convince the trier of fact that he never even considered whether the complainant was consenting. In her seminal article on the *mens rea* for sexual assault, Toni Pickard described such a claim as "fanciful".[123]

Second, a claim of total inadvertence is inconsistent with the structure of most sexual assault cases. Many sexual assault cases – such as MacIntyre and HW – involve diametrically opposed testimony.[124] The complainant testifies that she did not consent. The accused testifies that she did. Therefore, if the Crown proves the actus reus of non-consent beyond a reasonable doubt, then the trier of fact has usually accepted the entirety of the complainant's evidence. When the testimony is diametrically opposed, this necessarily means that the trier of fact has also rejected the accused's evidence.[125] Accordingly, by the time the trier of fact considers whether the Crown has proven *mens rea*, the accused's credibility has been eviscerated. At this stage, the likelihood of a

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"Reasonable Steps", *supra* note 6 at 396.

122 But see the Court of Appeal's endorsement of "reckless indifference" in *R v Carbone*, 2020 ONCA 394 at paras 125-27, where the Court stated that total indifference regarding the age of one's sexual partner often—but not always—reflects a conscious choice to treat age as irrelevant and is therefore a form of subjective recklessness. For academic criticism that this approach conflates recklessness and negligence, see Plaxton, *supra* note 121 at 3-5; Stuart, *supra* note 119.

123 See Toni Pickard, "Culpable Mistakes and Rape: Relating Mens Rea to the Crime" (1980) 30:1 UTLJ 75 at 77, footnote 6.

124 See *R v Osolin*, 1993 CanLII 54 (SCC) at 548-49 [*Osolin*]; *R v Livermore*, 1995 CanLII 43 (SCC) at para 21

[*Livermore*]; *R v Randall*; 2012 NBCA 25 at para 20 [*Randall*]; *R v Flaviano*, 2014 ABCA 219 at para 23, aff'd 2014

SCC 14 [*Flaviano*]; *R v Han*, 2018 BCCA 239 at para 26 [*Han*]; *R v Wisdom*, 2023 ONCJ 438 at para 152 [*Wisdom*]. See also *Sexual Offences*, *supra* note 6 at 3-31.

125 *Ibid.*

trier of fact accepting the accused's claim of total inadvertence is almost non-existent.

But it is not impossible;[126] courts have accepted the possibility of an involuntarily intoxicated accused successfully claiming complete inadvertence.[127] Furthermore, *R v Pappajohn*[128] provides an excellent illustration of why this conceptual problem should not be lightly disregarded. In *Pappajohn*, Justice Dickson (as he then was) accepted that there were legitimate concerns about acquitting an individual accused of rape because he had an unreasonable mistaken belief in consent.[129] However, these concerns were "practically unimportant" because the jury was able to see through a "cock-and-bull" story.[130] Ten years later, Parliament responded to *Pappajohn*, enacting section 273.2(b) to constrain the accused's ability to assert unreasonable claims of mistaken belief.[131] We must learn from history. It would be unwise to dismiss the conceptual problem of total inadvertence because of its impracticality.

Significantly, this conceptual problem is eliminated if the *mens rea* for sexual assault is the failure to reasonably advert to consent.[132] It is almost tautological to state that "total inadvertence" constitutes a failure to reasonably advert.[133]

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126 See *Osolin*, *supra* note 124 at 548-49, where McLachlin J (as she then was), La Forest and Gonthier JJ (speaking for the majority of the court on this point) stated that it is not "logically impossible" to accept different portions of conflicting testimony and ultimately conclude that the accused had an honest but mistaken belief in communicated consent. See also *Sexual Offences*, *supra* note 6 at 3-31. Presumably, similar logic would apply to a claim of total inadvertence

127 See *MacIntyre*, *supra* note 20 at para 65. See also *HW*, *supra* note 21 at para 78.

128 1980 CanLII 13 [*Pappajohn*].

129 *Ibid* at 155.

130 *Ibid* at 155-56.

131 See Lucinda Vandervort, "The Prejudicial Effects of 'Reasonable Steps' in Analysis of *Mens Rea* and Sexual Consent: Two Solutions" (2018) 55 Alta L Rev 933 at 936-37 [Vandervort].

132 "The Fault Element", *supra* note 16 at 11.

133 *Ibid*.

Therefore, adopting the *mens rea* of a failure to reasonably advert would eliminate any incentive for the accused to claim that he never even considered whether the complainant was consenting.[134]

B. *Morrison* Makes the *Mens Rea* Analysis Unnecessarily Complicated

Commentators have also argued that *Morrison* makes the *mens rea* analysis for sexual assault unduly complex.[135] Assuming that the *mens rea* is purely subjective and there is an air of reality to the defence of mistaken belief,[136] the trier of fact must sort through the following maze of considerations:

> **Case A:** The accused believed the complainant to have communicated consent and took reasonable steps to ascertain communicated consent. Result: the defence of mistake succeeds and the accused is acquitted.
>
> **Case B:** The accused believed the complainant to have communicated consent, but did not take reasonable steps to ascertain that fact. The jury must then reject the defence of mistake and so find as a fact that the accused did not believe that the complainant had communicated consent. Result: It depends.
>
> *Case B1*: The Crown otherwise proves that the accused knew, or was reckless as to, the lack of communicated consent. Result: The accused is convicted, despite his mistake of fact.
>
> *Case B2*: The Crown does not otherwise prove that the accused knew, or was reckless as to, the lack of communicated consent. Result: The accused is acquitted, but not because of his mistake of fact.
>
> **Case C**: The accused did not believe the complainant to have communicated consent (whether or not he took reasonable steps). The defence of mistake therefore fails. Result: It depends.

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134 *Ibid*.

135 See "Reasonable Steps", *supra* note 6 at 385-88; 395-97. See also "The Fault Element", *supra* note 16 at 8; Stuart, *supra* note 119.

136 For the trial judge to conclude that the defence has an air of reality, there must be some evidence supporting the claim of mistaken belief *and* that the accused took reasonable steps. See *R v Gagnon*, 2018 CACM 1 at para 27, aff'd 2018 SCC 41 [*Gagnon*]; *Sexual Offences*, *supra* note 6 at 3-32.

> *Case C1:* The Crown otherwise proves that the accused knew, or was reckless as to, the lack of communicated consent. Result: The accused is convicted.
>
> *Case C2:* The Crown does not otherwise prove that the accused knew, or was reckless as to, the lack of communicated consent. Result: The accused is acquitted, even though he has no defence of mistake.[137]

This complex matrix of considerations is problematic for two reasons. First, unnecessary legal complexity is inherently undesirable. Legal complexity should be tolerated when it achieves an important policy objective.[138] However, there is no important policy objective at work here.[139]

Second, complexity invites legal error. As stated succinctly by Kent Roach, "[s]exual assault law is a mess. It seems to be collapsing under its own weight and complexity."[140] Part of the reason for this complexity is the impact of *Morrison* on the *mens rea* analysis.[141] Triers of fact already struggled to correctly apply section 273.2(b) before *Morrison.*[142] In response to these struggles, appellate courts consistently ordered new trials.[143] New trials are particularly problematic for sexual assault cases because they require the complainant to re-live a deeply traumatic experience.[144] Alternatively, the Crown may abandon prosecution of the case, resulting in a potential miscarriage of justice.[145] The more complex *mens rea* analysis required by *Morrison* is likely to exacerbate this problem.

However, the complexity of this analysis is greatly reduced if the *mens rea* for sexual assault includes the failure to reasonably

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137 "Reasonable Steps", *supra* note 6 at 386, 396-98.

138 "The Fault Element", *supra* note 16 at 8.

139 *Ibid.*

140 Kent Roach, "Sexual Assault Law" (2022) 70 CLQ 1 at 1.

141 *Ibid*. See also Stuart, *supra* note 119.

142 Vandervort, *supra* note 131 at 945-47.

143 *Ibid* at 960-64.

144 *Ibid.*

145 *Ibid*.

advert.[146] This is because the Crown has necessarily proven *mens rea* if it disproves the defence of mistaken belief.[147] Assuming there is an air of reality to the defence of mistaken belief,[148] the Crown can disprove the defence in two ways. First, it can prove that the accused failed to take reasonable steps to ascertain consent.[149] If the Crown proves an absence of reasonable steps, then it has also proven a failure to reasonably advert.[150] It would be nonsensical to claim that the accused reasonably adverted to consent even though he failed to take reasonable steps to ascertain consent.

Second, the Crown can disprove the defence by showing that the accused did not actually have a mistaken belief in communicated consent.[151] If the Crown proves an absence of belief in consent, then the accused can only have two possible states of mind regarding consent: (1) subjective awareness of non-consent; or (2) no awareness of consent.[152] Both states of mind are culpable when the *mens rea* is the failure to reasonably advert to consent.

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146 "The Fault Element", *supra* note 16 at 11-12.

147 *Ibid.*

148 I will address the more difficult situation of when there is no air of reality to the defence below.

149 *Code*, *supra* note 2, s 273.2(b).

150 "The Fault Element", supra note 16 at 11-12.

151 *Ibid.*

152 Stewart phrases this idea differently. He states that the Crown necessarily proves the *mens rea* of knowledge or recklessness when it proves that the accused did not actually have a mistaken belief in consent: "[w]here the accused's own position is that he adverted to consent — a necessary element of the defence of mistake, according to s 273.2(*b*) – there is no room for a finding that he didn't believe that consent had been communicated but didn't know that there was a lack of communicated consent." However, if this is true, then I struggle to see why the accused's failure to take reasonable steps does not inexorably demonstrate recklessness. By showing an air of reality to the defence of mistaken belief, it seems to me that "the accused's own position is that he adverted to consent." Accordingly, if the defence fails because the accused failed to take reasonable steps, then the only remaining state of mind is subjective awareness of non-consent (i.e. recklessness). See Stewart, "The Fault Element", *supra* note 16 at 11-12.

Put simply, the *mens rea* of failing to reasonably advert to consent collapses the distinction between proof of *mens rea* and disproof of the mistaken belief defence. The result is a significant reduction in analytical complexity. If the air of reality threshold is met, then the complex matrix of considerations reproduced above collapses into a simple three-part framework:

> **Case A**: The accused believed the complainant to have communicated consent and took reasonable steps to ascertain communicated consent. Result: the defence of mistake succeeds and the accused is acquitted.
>
> **Case B**: The accused believed the complainant to have communicated consent but did not take reasonable steps to ascertain that fact. Result: the accused is convicted.
>
> **Case C**: The accused did not believe the complainant to have communicated consent, although he took reasonable steps in the circumstances. The defence of mistake therefore fails. Result: the accused is convicted.

However, this reduction in complexity is premised on a fundamental assumption: the air of reality threshold is satisfied. This assumption is significant because, as already discussed, many cases of sexual assault involve diametrically opposed testimony. The air of reality threshold is almost never satisfied when the case involves diametrically opposed testimony.[153] Problematically, adopting the *mens rea* of failure to reasonably advert does not reduce analytical complexity if the air of reality threshold is not satisfied. In this scenario, the trier of fact must distinguish between the failure of the defence and proof of *mens rea*. This result is required by the presumption of innocence.

To explain this result, it is helpful to briefly review the three ways the defence of mistaken belief in communicated consent can fail:

> (1) the accused cannot show an air of reality to his claim that
> (i) he took reasonable steps to ascertain consent; or

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[153] See *Osolin*, *supra* note 121 at 548-49; *Livermore*, *supra* note 121 at para 21; *Randall*, *supra* note 121 at para 20; *Flaviano*, *supra* note 121 at para 23; *R v Han*, *supra* note 121 at para 26; *R v Wisdom*, *supra* note 121 at para 152. See also *Sexual Offences*, *supra* note 6 at 3-31.

(ii) he mistakenly believed the complainant communicated consent;

(2) the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps; or

(3) the Crown proves beyond a reasonable doubt that the accused did not mistakenly believe the complainant communicated consent.[154]

Significantly, the burden of proof differs when the accused cannot show an air of reality. It is the *accused* that bears the burden of demonstrating an air of reality to the defence of mistake. This reverse onus does not violate the presumption of innocence because the accused only bears an *evidentiary* burden.[155] He does not need to persuade the trier of fact of anything. He simply needs to point to evidence that would be exculpatory if accepted by the trier of fact.[156] The trier of fact always starts from the presumption that the accused reasonably adverted to consent.[157] The accused's failure to discharge an evidentiary burden does not change this presumption.[158]

Accordingly, if the defence fails because the accused failed to show an air of reality to the defence of mistake, the Crown is still required to prove *mens rea*.[159] It always bears the *persuasive* burden of proving the accused's failure to reasonably advert beyond a

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154 See Stewart, *Sexual Offences*, *supra* note 6 at 3-26, 3-29.

155 See *Osolin*, *supra* note 121 at 534-7. See also Stewart, *Sexual Offences*, *supra* note 6 at 3-26.

156 See *R v Cinous*, 2002 SCC 29 at para 82; *Park*, 1995 CanLII 104 SCC at paras 30-31; *Osolin*, *supra* note 121 at 682. See also *Sexual Offences*, *supra* note 6 at 3-29.

157 See Stewart, "The Fault Element", *supra* note 16 at 11-12.

158 *Ibid* at 10-12.

159 The only way around this result is to claim that there is no corresponding *mens rea* to the *actus reus* of non-consent. This was the Crown's position in *MacIntyre*, *supra* note 20 at paras 22-23 and *HW*, *supra* note 21 at para 33. In addition to the reasons given in those cases for rejecting the Crown's argument, Stewart explains that this position misconceives the mistake of fact defence as an affirmative defence akin to duress or necessity. The defence of mistaken belief is exculpatory because it negates *mens rea*. If there is no *mens rea*, then it is unclear on this view why a mistaken belief would be exculpatory. See "The Fault Element", *supra* note 16 at 10.

reasonable doubt.[160] This result is unfortunate because it means that the trier of fact will need to distinguish between proof of *mens rea* and the failure of the mistaken belief defence in the vast majority of sexual assault cases, even if the *mens rea* is not purely subjective.

Furthermore, a subjective-objective *mens rea* would implicitly overturn the Supreme Court's decision in *Gagnon.* In *Gagnon*, the Court stated that the Crown does not need to disprove reasonable steps unless the accused's claim of reasonable steps has an air of reality.[161] However, as already discussed, if the *mens rea* for sexual assault is subjective-objective, then the presumption of innocence requires the Crown to *always* prove that the accused did not take reasonable steps or was reckless towards the absence of communicated consent.[162] The Crown bears this burden regardless of whether the defence of mistaken belief has an air of reality.[163] Therefore, the rule in *Gagnon* and subjective-objective *mens rea* are incompatible.

C. *Morrison* Causes Reasonable Steps Requirements to Violate the Presumption of Innocence

Stewart has argued that Justice Moldaver's interpretation of section 172.1(4) results in all reasonable steps requirements violating section 11(d) of the *Charter.*[164] If the *mens rea* is purely

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160 See "The Fault Element", *supra* note 16 at 12.

161 See *Gagnon*, *supra* note 136 at para 27, aff'd 2018 SCC 41; Stewart, *Sexual Offences*, *supra* note 6 at 3-32.

162 "The Fault Element", *supra* note 16 at 11-12.

163 *Ibid.*

164 See "Reasonable Steps", *supra* note 6 at 397-98. The leading cases on the constitutionality of reasonable step provisions have only addressed whether these provisions violate s 7 of the *Charter*, not s 11(d). See *Darrach*, 1998 CanLII 1648, 1998 CarswellOnt 684 (CA) at paras 84-93 (cited to CarswellOnt), where the Court of Appeal stated that s 273.2(b) did not violate s 7 of the *Charter*, but did not address s11(d). Furthermore, the Court of Appeal assumed that the *mens rea* was partially objective and therefore automatically proven if the accused failed to take reasonable steps per s 273.2(b). See also *Morrison*, *supra* note 7 at footnote 2, where Court explained that it would not consider whether s 172.1(4) violated s 11(d) because

subjective, then section 273.2(b) operates similarly to section 172.1(3).[165] Significantly, the Supreme Court unanimously held that section 172.1(3) violated the presumption of innocence.[166] The *mens rea* for child luring is knowledge that the complainant is underage.[167] Therefore the trier of fact must presume that the accused did not know the complainant was underage until the Crown proves otherwise.[168] However, if the complainant represented themselves to the accused as being underage, section 172.1(3) requires the trier of fact to presume that the accused knew the complainant was underage – absent evidence to the contrary.[169] This violates the presumption of innocence because there is no inexorable connection between representation and belief.[170]

Just like section 172.1(3), section 273.2(b) creates a factual presumption; however, the factual presumption created by section 273.2(b) is irrebuttable.[171] If the accused did not take reasonable steps to ascertain consent, then the trier of fact is required to find that the accused did not believe the complainant communicated consent.[172] However, there is no inexorable connection between the accused's failure to take reasonable steps and the factual absence of mistaken belief.[173] Accordingly, the presumption of innocence is violated.[174]

R v WG[175] provides a concrete example of this problem. WG had sexual intercourse with a 15-year-old boy.[176] He was charged

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Morrison did not address the issue in his submissions.

165 See "Reasonable Steps", *supra* note 6 at 398.

166 See *Morrison*, *supra* note 7 at paras 60, 161, 208.

167 *Ibid* at para 55.

168 *Ibid*.

169 *Ibid*.

170 *Ibid* at para 57.

171 See "Reasonable Steps", *supra* note 6 at 398.

172 *Ibid*.

173 *Ibid*.

174 *Ibid*.

175 2021 ONCA 578 [*WG*].

176 *Ibid* at paras 14, 21.

with sexual interference.[177] At trial, the judge held that WG honestly but mistakenly believed the complainant was at least 16-years-old.[178] However, he failed to take reasonable steps to determine the complainant's age.[179] Accordingly, the trial judge refused to give legal effect to WG's mistaken belief in age.[180] The trial judge held that the Crown had proven *mens rea* for sexual interference by proving that WG failed to take reasonable steps.[181]

The Court of Appeal stated – consistent with *MacIntyre* and *HW* – that WG's failure to take reasonable steps was insufficient to prove *mens rea*.[182] The trial judge erred when he convicted the accused on this basis.[183] Nevertheless, the Court of Appeal upheld the conviction.[184] Once the trial judge concluded that WG's mistaken belief was legally unavailable, the only available finding on the facts was recklessness regarding age:

> The trial judge rejected the single defence advanced, that is to say, that the appellant honestly believed L. S. was over 16 when the sexual activity prohibited by s. 151 took place. The rejection was *grounded on the appellant's failure to take all reasonable steps* to ascertain L.S.'s true age. This rejection *took the appellant's claim that he believed L.S. was at least 16 out of the evidentiary mix.* This rejection, on these facts, left only two possibilities. Either the appellant actually knew or was willfully blind to whether L.S. was under 16, or that he was reckless about L.S.'s true age.[185]

This interpretation of reasonable steps violates the presumption of innocence. WG's mistaken belief in age would have led to an acquittal if section 150.1(4) did not preclude the judge from considering this mistake when determining whether the Crown had proven *mens rea*. Just like section 172.1(3), section 150.1(4)

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177 *Ibid* at para 32, citing *Code*, *supra* note 2, s 151.

178 *Ibid* at para 32.

179 *Ibid*.

180 *Ibid*, citing *Code*, *supra* note 2, s 150.1(4).

181 *Ibid* at para 74.

182 *Ibid* at para 69

183 *Ibid* at para 75.

184 *Ibid* at para 81.

185 *Ibid*, emphasis added.

deems the existence of fact X (the absence of mistaken belief) based on the existence of fact Y (the absence of reasonable steps) even though there is no inexorable connection between facts X and Y.

Furthermore, section 150.1(4) and 273.2(b) cannot be distinguished from section 172.1(3) on the ground that section 172.1(3) presumes *mens rea* (belief in age), whereas sections 150.1(4) and 273.2(b) presume the unavailability of a defence – which is insufficient to prove *mens rea* if the *mens rea* is purely subjective. The Supreme Court of Canada made this point clearly in *R c St-Onge Lamoureux*.[186] In *Lamoureux,* the accused argued that section 258(1)(c) violated section 11(d) of the *Charter*.[187] Section 258(1)(c) allowed the Crown to rely on breathalyzer test results without proving the validity of those results.[188] It did not establish a presumption that the accused had a blood alcohol level over the legal limit as required by the offence.[189] However, section 258(1)(c) still violated the presumption of innocence:

> What is important for the purpose of determining whether the right to be presumed innocent is violated is not whether the statutory presumption relates to an essential element of the offence, but whether it exempts the prosecution from establishing the guilt of the accused beyond a reasonable doubt before the accused must respond [footnotes omitted]. Thus, like the presumption at issue in Oakes, the ones established in s. 258(1)(c) will violate the right to be presumed innocent if they can result in the conviction of an accused in spite of a reasonable doubt that the accused is in fact guilty.[190]

Sections 150.1(4) and 273.2(b) operate similarly. Although they do not require the trier of fact to presume a fact sufficient to prove *mens rea*, they allow the accused to be convicted in spite of a reasonable doubt that the accused is in fact guilty.[191] The trier of

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186 2012 SCC 57 [*Lamoureux*].

187 *Ibid* at para 21.

188 *Ibid* at para 23.

189 *Ibid*.

190 *Ibid* at para 24, citing *Oakes,* [1986] 1 SCR 103, emphasis added.

191 I do not consider whether these reasonable steps provisions could be upheld under s1 of the *Charter* because my purpose is not to defend them against constitutional attack. As discussed under Part 4, I argue that courts should use the *Charter* as a means to *interpret* these provisions and adopt a subjective-

fact must presume the absence of a mistaken belief in consent based on the accused's failure to take reasonable steps. This mistaken belief would have generated a reasonable doubt about the accused's guilt if it was not removed from "the evidentiary mix".[192]

Significantly, reasonable steps requirements do not violate section 11(d) of the *Charter* if the *mens rea* is subjective-objective. There is no violation of the presumption of innocence because the accused's failure to take reasonable steps necessarily proves *mens rea*. A mistaken belief – absent reasonable steps – would not be exculpatory because it does not negate the *mens rea* of failing to reasonably advert. Therefore, excluding consideration of the mistaken belief does not permit the accused to be convicted despite a reasonable doubt about his guilt.

Angel makes this point clearly.[193] The facts of *Angel* are almost identical to *WG*. Angel had sexual intercourse with an underage boy.[194] The trial judge found that Angel subjectively believed the boy to be 16-years-old.[195] However, Angel failed to take reasonable steps to determine the boy's age.[196] Accordingly, the trial judge rejected the mistake of age defence and convicted Angel of sexual interference.[197] Angel appealed the conviction, alleging that the trial judge erred by convicting him solely on the basis of his failure to take reasonable steps.[198]

The British Columbia Court of Appeal dismissed the appeal. However, unlike the Ontario Court of Appeal in *WG*, the Court stated that Angel's failure to take reasonable steps was sufficient to prove the *mens rea* of sexual interference.[199] The reasoning in

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objective standard of fault.

192 *WG*, *supra* note 175 at para 81.

193 *Angel*, *supra* note 7.

194 *Ibid* at para 16.

195 *Ibid* at para 17.

196 *Ibid* at paras 17-18, citing *Code*, *supra* note 2, s 150.1(4).

197 *Ibid* at para 20, citing *Code*, *supra* note 2, s 151.

198 *Ibid* at paras 21-22.

199 *Ibid* at para 30.

Morrison does not apply to the offence of sexual interference.[200] The reasonable steps requirement "is not only necessary to negate or confirm the defence, it also imports an objective element into the requisite *mens rea*."[201] Therefore, proof that the accused failed to take reasonable steps was sufficient to prove *mens rea*.[202]

Accordingly, unlike in *WG*, Angel's failure to take reasonable steps did not preclude the trier of fact from considering evidence that would have generated a reasonable doubt about his guilt. His failure to take reasonable steps proved his guilt. Put differently, the issue of *mens rea* was moot once the Crown disproved reasonable steps and his mistaken belief in age was irrelevant to the verdict. Therefore, section 150.1(4) did not infringe his presumption of innocence.

The comparison between *WG* and *Angel* illustrates that the constitutionality of section 150.1(4) – and, by analogy, section 273.2(b) – is completely dependent on the Court's articulation of the fault element. Reasonable steps requirements infringe section 11(d) unless the failure to take reasonable steps inexorably proves *mens rea*. This is a compelling reason to adopt a subjective-objective *mens rea* for sexual assault.

IV. *MORRISON* PRECLUDES A SUBJECTIVE-OBJECTIVE *MENS REA* AS A MATTER OF *STARE DECISIS*

From the foregoing, it is clear that a subjective-objective *mens rea* has a number of advantages over a purely subjective *mens rea* for the offence of sexual assault. However, if the Crown wishes to convince a court to interpret section 273.2(b) as articulating a subjective-objective *mens rea*, it must first demonstrate that *Morrison* does not preclude this interpretation. This will be challenging. Justice Moldaver's interpretation of section 172.1(4) has obvious implications for section 273.2(b) – a highly analogous provision. Furthermore, the textual difference between sections 172.1(4) and

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200 *Ibid.*

201 *Ibid* at para 48.

202 *Ibid* at para 49.

273.2(b) provides an exceedingly thin basis to distinguish the two provisions.

Alternatively, the Crown must convince the Supreme Court to overturn *Morrison.* This argument is unlikely to succeed; the test for overturning a precedent is extremely rigorous. However, the potential unconstitutionality of reasonable steps requirements after *Morrison* provides a reasonable basis to argue that *Morrison* should be overturned. If this alternative path fails, then the only viable option is legislative amendment. A legislative solution is straightforward. However, it is extremely unlikely that such an amendment will take place in the near future.

A. *Morrison* Cannot Be Distinguished

Grant and Benedet have argued that section 273.2(b) can be distinguished from its counterpart in child luring because the *mens rea* for sexual assault is recklessness, not knowledge.[203] Significantly, Justice Moldaver explicitly limited his reasons to the context of child luring.[204] The *mens rea* for child luring is only satisfied by knowledge.[205] Knowledge is not proven by the failure of the mistaken belief defence.[206] However, this conclusion does not hold true when the *mens rea* is recklessness: "[s]omeone who fails to take reasonable steps, when he knows of circumstances triggering a need to do so, is reckless."[207] Accordingly, for the offence of sexual assault, there is no need to distinguish between the failure of the mistaken belief defence and proof of *mens rea.*[208] However, distinguishing *Morrison* on this basis rests on a fundamental assumption: the accused's failure to take reasonable steps is inexorably reckless. As already discussed, courts and academic commentators have rejected this assumption because it is

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203 Grant & Benedet, *supra* note 7 at 10.

204 *Ibid*, citing *Morrison*, *supra* note 7 at para 101.

205 See Grant & Benedet, *supra* note 7 at 10.

206 *Ibid.*

207 *Ibid.*

208 *Ibid.*

inconsistent with the prevailing definition of recklessness.[209] Recklessness requires subjective awareness of a fact.[210] The failure to take reasonable steps does not inexorably demonstrate subjective awareness.[211] Accordingly, it is not possible to distinguish *Morrison* on the grounds that recklessness is a sufficient *mens rea* for sexual assault.[212]

Ultimately, if the Crown seeks to avoid the application of *Morrison* to a sexual assault case, it must provide the Court with a textual basis to follow Justice Abella's interpretation of reasonable steps. Put simply, it must convince the Court that section 273.2(b) makes the *mens rea* for sexual assault partially objective even though Justice Moldaver explicitly rejected this interpretation of section 172.1(4). For this argument to succeed, the Crown will have to show that Justice Moldaver's interpretation of section 172.1(4) was necessitated by sections 172.1(1)(b) and (3) – not because they prescribe the subjective fault element of *knowledge* – but because they explicitly prescribe *subjective fault*.

The starting point for this argument is a presumption of statutory interpretation: every *actus reus* defined in the *Code* has a corresponding subjective *mens rea*.[213] The minimum subjective *mens rea* is recklessness.[214] This presumption is only rebutted by clear language to the contrary.[215] In *Morrison*, sections 172.1(1)(b) and (3) partially rebutted this presumption.[216] The presumption of subjective fault was not rebutted, but the presumption of

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209 See Plaxton, *supra* note 121 at 2-4; "The Fault Element", *supra* note 16at 6-7; *MacIntyre*, *supra* note 20 at para 65; *HW*, *supra* note 21 at paras 78-81.

210 *Ibid*.

211 *Ibid*.

212 See *MacIntyre*, *supra* note 20 at paras 52-54; *HW*, *supra* note 21 at para 67.

213 See *R v Zora*, 2020 SCC 14 at para 32 [*Zora*]; *R v ADH*, 2013 SCC 28 at para 23 [*ADH*]; *R v Sault St Marie*, 1978 CanLII 11 (SCC) at 1303, 1309-10 [*Sault St Marie*]. See also "The Fault Element", *supra* note 16 at 5.

214 See *Zora*, *supra* note 213 at para 109; *Pappajohn*, *supra* note 128 at 139; *Sault St Marie*, *supra* note 213 at 1309-10.

215 See *Zora*, *supra* note 213 at para 33; *ADH*, *supra* note 213 at para 27. See also "The Fault Element", *supra* note 16 at 5.

216 *Morrison*, *supra* note 7 at para 81.

recklessness was; the clear language of the *Code* required a *mens rea* of subjective knowledge.[217] Section 172.1(4) could not displace this clear language.[218] It would be inconsistent with the language of sections 172.1(1)(b) and (3) to read section 172.1(4) as prescribing an additional, subjective-objective form of fault.[219]

The Crown would then have to argue that the absence of provisions analogous to sections 172.1(1)(b) and (3) for the offence of sexual assault is decisive. There is no language in the *Code* that explicitly prescribes the fault element for sexual assault.[220] Accordingly, the presumption of recklessness as a fault element is not rebutted in favour of a *higher* standard of subjective *mens rea*. Instead, the Crown must argue that the presumption of recklessness is rebutted – or more accurately, supplemented – by section 273.2(b)'s prescription of subjective-objective fault.[221] Following this line of reasoning, if the *Code* was amended so that the term "belief" was removed from section 172.1(1)(b) – and section 172.1(3) was removed from the *Code* entirely – then Justice Moldaver would have agreed with Justice Abella that section 172.1(4) prescribes a form of subjective-objective *mens rea*. Put differently, the language of section 172.1(4) is strong enough to rebut the *presumption* of subjective fault even though it is not strong enough to rebut the explicit *prescription* of subjective fault.

However, it is unlikely that a court would accept this argument. First, it relies heavily on the Supreme Court's reasoning in

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217 *Ibid*.

218 *Ibid* at para 82.

219 *Ibid* at para 84.

220 I am assuming for the sake of argument that this point is correct. However, there is good reason to believe that it is not: see "The Fault Element", *supra* note 16 at 5, where he states that s 265(4) provides a strong textual indication that the *mens rea* for sexual assault is purely subjective.

221 See *George*, *supra* note 6 at para 8, where the Court stated that "[a]t common law, "true crimes" — like those at issue here [sexual interference per s 151]— would have a purely subjective fault element. However, through statutory intervention, Parliament has imported an objective element into the fault analysis to enhance protections for youth [footnotes omitted]."

George.[222] Justice Moldaver expressly declined to follow *George*, explaining that it was made without the benefit of "full argument and considered analysis".[223] Second, it fails to explain why Justice Moldaver highlighted the language "[i]t is not a defence" in section 172.1(4).[224] This language was clearly important to Justice Moldaver. He disagreed with Justice Abella's interpretation of section 172.1(4) on the grounds that substituting the failure of a defence for proof of *mens rea* violated a "bedrock principle of criminal law".[225]

Significantly, just like section 172.1(4), section 273.2 begins with the phrase "[i]t is not a defence". Following Justice Moldaver's reasoning, this language indicates that section 273.2(b) is merely a statutory bar to the defence of mistaken belief, not an expression of *mens rea*.[226] This is how the Court in *MacIntyre* interrupted Justice Moldaver's reasons on this point. The Court stated that the absence of a provision analogous to section 172.1(3) was not a sufficient basis to distinguish *Morrison.*[227] The "real core" of Justice Moldaver's reasoning was that the failure of a defence cannot prove *mens rea*.[228] The absence of section 172.1(3) does not fundamentally change this reasoning.[229]

Despite these challenges, the Crown successfully convinced the British Columbia Court of Appeal not to follow *Morrison* in *Angel.* As already discussed, *Angel* was a sexual interference case where the accused failed to take reasonable steps to determine age as required by section 150.1(4).[230] The trial judge concluded that the Crown

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222 *Ibid*.

223 *Morrison*, *supra* note 7 at para 91.

224 *Ibid* at para 82.

225 *Ibid* at paras 84-85.

226 *Code*, *supra* note 22, s 273.2(*b*).

227 *Morrison*, *supra* note 7 at para 54.

228 *Ibid*.

229 *Ibid*.

230 *Morrison*, *supra* note 7 at para 17.

had proven the *mens rea* for sexual interference by demonstrating Angel's failure to take reasonable steps.[231]

Upholding the conviction, the Court of Appeal explained that, unlike for the offence of child luring, the *mens rea* for sexual assault is recklessness.[232] In this context, proof that the accused failed to take reasonable steps inevitably leads to a conviction.[233] This is because the reasonable steps requirement "imports an objective element into the requisite *mens rea*."[234] Any subjective belief formed without taking reasonable steps is "not objectively reasonable, and [is] therefore reckless."[235] In addition, the Court of Appeal highlighted Benedet and Grant's commentary on *Morrison*, explaining that *Morrison* should be limited to its factual scenario to avoid undermining decades of sexual assault law reform.[236]

With respect, the Court in *Angel* did not distinguish *Morrison*; it refused to apply it. Although the Court purported to distinguish *Morrison* on the basis that the *mens rea* for sexual interference is recklessness,[237] it rejected Justice Moldaver's reasoning in favour of *George* and Justice Abella's dissenting reasons.[238] The Court stated that the reasonable steps requirement "imports an objective element into the requisite *mens rea*."[239] This statement is indistinguishable from Justice Abella's articulation that section 172.1(4) creates a "subjective-objective pathway" to conviction.[240] Clearly, the fundamental thrust of the Court's reasons is that the reasonable steps requirement impacts *mens rea*.[241] This was the

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231 *Ibid* at paras 17-20.

232 *Ibid* at para 45.

233 *Ibid* at para 48.

234 *Ibid*.

235 *Ibid* at para 49.

236 *Ibid* at paras 50-51, citing Grant & Benedet, *supra* note 7.

237 *Ibid* at para 30.

238 *Ibid* at paras 37-51.

239 *Ibid* at para 48.

240 *Morrison*, *supra* note 7 at paras 209-211.

241 *Angel*, *supra* note 7 at paras 48-49.

exact proposition that Justice Moldaver rejected in *Morrison.*[242] Put simply, the Court rejected the reasoning animating the majority reasons in *Morrison.*[243] The Court's reliance on academic criticism of *Morrison* furthers this conclusion.[244]

B. Overturning *Morrison* Will Be Extremely Challenging

Eventually, another case like *Angel* will arise and the Supreme Court will allow leave to appeal. When this time comes, the Crown will try to convince the Supreme Court that the lower Court successfully distinguished *Morrison.* However, this argument is unlikely to succeed for the reasons it just discussed. Accordingly, the Crown will lose the appeal unless it can convince the Supreme Court to disregard horizontal *stare decisis* and overturn *Morrison.*

The Crown faced a similar challenge in *R v Kirkpatrick.*[245] In *Kirkpatrick,* the Crown sought to persuade the Court that condom usage is relevant to the complainant's consent because it forms part of the "sexual activity in question".[246] However, the Court's previous decision in *R v Hutchinson*[247] made this argument extremely challenging. In *Hutchinson,* the majority of the Court stated that "[t]he "sexual activity in question" does not include conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases."[248] Accordingly, Hutchinson's use of a sabotaged condom was not part of the "sexual activity in question".[249] The act of condom sabotage was irrelevant to whether the complainant consented.[250]

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242 *Morrison, supra* note 7 at paras 84-85.

243 See also *R v Jerace*, 2021 BCCA 94 at paras 37-40 [*Jerace*].

244 *Angel*, *supra* note 7 at paras 50-51.

245 2022 SCC 33 [*Kirkpatrick*]

246 *Ibid* at para 36, citing *Code*, *supra* note 2, s 273.1(1).

247 2014 SCC 19 [*Hutchinson*].

248 *Ibid* at para 55.

249 *Ibid* at paras 64-65.

250 *Ibid*.

In *Kirkpatrick,* the Crown sought to distinguish *Hutchinson* on the basis that Hutchinson *sabotaged* a condom, whereas Kirkpatrick simply *did not wear a condom.*[251] The majority of the Court accepted this argument.[252] *Hutchinson* did not explicitly say that condom non-usage should be analyzed through the same lens as condom sabotage.[253] Condom non-usage was not at issue in Hutchinson.[254] Accordingly, the Court was not bound by Hutchinson on this point.[255]

However, a four-justice minority of the Court vehemently disagreed with the majority on this point:

> In our respectful view, our colleague's reasons are flawed because the core issue on appeal (the statutory interpretation of "the sexual activity in question" in s. 273.1(1)) is a straightforward question of law that this Court categorically resolved in *Hutchinson.* Our colleague relies on the argument that this case is *factually* distinguishable. But this is irrelevant, as the underlying question of law is identical across both appeals.[256]

The Supreme Court's interpretation of a statute is meant to apply broadly.[257] After the Court interprets a statute, "multiple competing interpretations or "gradients" of application based on the facts of a particular case" are not acceptable.[258] Accordingly, for the Crown's submission in *Kirkpatrick* to succeed, *Hutchinson* needed to be overruled.[259] It could not be distinguished.[260]

Many of the minority's comments in *Kirkpatrick* would be apposite if the Crown attempted to distinguish section 273.2(b) from section 172.1(4). The interpretation of these provisions presents the same legal issue: if the defence of mistaken belief is

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251 *Kirkpatrick*, *supra* note 245 at paras 36, 76.

252 *Ibid* at para 88.

253 *Ibid*.

254 *Ibid*.

255 *Ibid* at para 97.

256 *Ibid* at para 128, emphasis original.

257 *Ibid* at paras 127-130.

258 *Ibid* at para 130.

259 *Ibid* at paras 168-170.

260 *Ibid*.

unavailable because the accused did not take reasonable steps, is this sufficient to prove *mens rea?* Justice Moldaver answered this question with an unequivocal "no". In fact, distinguishing Justice Moldaver's interpretation of section 172.1(4) from section 273.2(b) may be an even thinner distinction than the one accepted by the majority of the Court in *Kirkpatrick.* At least there was a factual difference between *Hutchinson* and *Kirkpatrick*. This factual difference could be construed as affecting the legal issue before the Court. Contrarily, the difference between sections 172.1(4) and 273.2(b) is purely textual. As already discussed, there are few textual differences between these provisions.

Therefore, the Crown will have to persuade the Court to overrule *Morrison.* Significantly, the minority in *Kirkpatrick* expressly declined to overturn *Hutchinson*.[261] The test for overturning a precedent is rigorous.[262] The Supreme Court will only overturn its own precedent in three circumstances:

> (1) The court rendering the decision failed to have regard to a binding authority or relevant statute ("*per incuriam*");
> (2) The decision has proven unworkable ("unworkability"); or
> (3) The decision's rationale has been eroded by significant societal or legal change ("foundational erosion").[263]

None of these circumstances applied to *Hutchinson*: (1) the Court did not ignore a binding precedent or statute;[264] (2) there was no jurisprudence demonstrating that lower courts applied *Hutchinson* unpredictably;[265] and (3) there was no legal or social change that eroded the reasoning in *Hutchinson.*[266] Significantly, academic and judicial criticism of *Hutchinson* was an insufficient basis to overturn the decision.[267]

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261 *Ibid* at para 270

262 *Ibid* at para 204.

263 *Ibid* at para 202.

264 *Ibid* at paras 272-74.

265 *Ibid* at paras 275-78.

266 *Ibid* at paras 279-283.

267 *Ibid* at paras 246-249, 277.

The Court would likely reach many of the same conclusions if the Crown attempted to overturn *Morrison.* First, Justice Moldaver expressly considered and rejected the notion that he was bound by the Court's comments at paragraph 8 of *George*.[268] Second, despite the potential complexity of *Morrison* in the abstract,[269] courts have not applied *Morrison* in an unduly complex or unpredictable manner. Unworkability must be demonstrated, not asserted.[270] The approach taken in *MacIntyre, HW,* and *WG* is coherent. Furthermore, the differing approach taken by the British Columbia Court of Appeal in *Angel* and *Jerace* do not undermine this point. In these decisions, the Court simply *refuses* to apply *Morrison.* This is identical to *Kirkpatrick*, where the minority of the Court observed that "a tiny fraction of reviewing judges simply *disagree* with *Hutchinson.*"[271] This did not demonstrate unworkability.[272] Finally, there is no obvious societal or legal change undermining the reasoning of the decision. The recency of *Morrison* militates against a finding of foundational erosion.[273]

However, the Crown could make a novel argument that was not available in *Kirkpatrick:* the Court's interpretation of section 172.1(4) in *Morrison* must be overturned because it causes the provision to violate section 11(d) of the *Charter*. As already discussed, there is a compelling argument that Justice Moldaver's interpretation of section 172.1(4) causes the provision to violate the presumption of innocence.[274] If this argument is accepted, it would provide support for a further argument that *Morrison* should be overturned.

Significantly, the Supreme Court has repeatedly stated that a precedent can be overturned "in order to avoid a *Charter*

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268 *Morrison*, *supra* note 7 at paras 86-91.

269 See "Reasonable Steps", *supra* note 6 at 385-88; 395-97; "The Fault Element", *supra* note 16 at 8; Stuart, *supra* note 119

270 *Ibid* at paras 231, 276-77.

271 *Ibid* at para 276, emphasis original.

272 *Ibid* at paras 276-78.

273 *Ibid* at para 256

274 See "Reasonable Steps", *supra* note 6 at 397-98.

breach".[275] Furthermore, the Court in *Kirkpatrick* stated that "[t]he need to revisit precedents that conflict with the Constitution is clear".[276] Admittedly, the Court made this comment with respect to precedents that predated Canada's adoption of the *Charter*.[277] However, it is submitted that the same principles should apply when a decision was made without regard to the *Charter*. Alternatively, the Crown could argue that the Court's refusal to consider section 11(d) of the *Charter* when interpreting section 172.1(4) rendered its interpretation *per incuriam*.[278]

The subtleties of this argument are important. The Crown's goal is not to persuade the Court to strike down section 273.2(b) because it violates section 11(d) of the *Charter*. Its goal is to have the Court *interpret* section 273.2(b) with regard to the *Charter*. Put differently, the Court should hold that section 273.2(b) prescribes subjective-objective fault because any other interpretation renders the provision unconstitutional. Accordingly, the Crown must argue that – had the Court in *Morrison* considered section 11(d) – it would have interpreted section 172.1(4) in a manner that avoided infringing the presumption of innocence.

However, courts' ability to consider the *Charter* when interpreting legislation is limited. Courts cannot use the *Charter* as an interpretive device unless a statute is genuinely ambiguous.[279] A genuine ambiguity arises if there are two equally plausible interpretations of a statute.[280] If this situation arises, the Court can choose the interpretation that best accords with the *Charter* and its

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275 *R v B (KG)*, 1993 CanLII 116 (SCC), [1993] 1 SCR 740 at 778 (cited to SCR). See also *R v Chaulk*, 1990 CanLII 34 (SCC), [1990] 3 SCR 1303 at 1353 (cited to SCR); *R v Bernard*, 1988 CanLII 22 (SCC) at paras 28-45.

276 *Kirkpatrick*, *supra* note 245 at para 234.

277 *Ibid*.

278 *Morrison*, *supra* note 7 at footnote 2.

279 See *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62 [*Bell*]; *R v Rodgers*, 2006 SCC 15 at para 18; *R v Gomboc*, 2010 SCC 55 at paras 87-89; *R v Boudreault*, 2012 SCC 56 at para 85; *R v Clarke*, 2014 SCC 28 at para 16.

280 *Ibid*.

values.[281] Accordingly, the Crown would have to argue that Justices Moldaver and Abella's interpretations of section 172.1(4) are equally plausible and reflect a genuine ambiguity. However, section 172.1(4) is only constitutional if Justice Abella's interpretation is accepted. For this reason, Justice Abella's interpretation of 172.1(4) must be adopted as a definitive statement of the law. Undoubtedly, there are many places where this novel argument could fail. However, it appears to be the only path forward for potential litigants, as *Morrison* stands squarely in the way of adopting a subjective-objective *mens rea* for the offence of sexual assault.

C. Legislative Amendment

All of the foregoing leads to a fundamental conclusion: the most probable solution to this vexing issue is legislative amendment. Although this solution provides cold comfort to potential litigants, the necessary amendment is straightforward. Parliament has a number of options that would ensure a subjective-objective *mens rea* for sexual assault. The most obvious of these options is a provision stating that the *mens rea* for sexual assault is established when the Crown proves that the accused either (1) was reckless towards the complainant's lack of consent; or (2) failed to take reasonable steps to determine whether the complainant was consenting. This option would explicitly create the "two pathways to conviction" that Justice Moldaver rejected in *Morrison*. However, this solution is inconsistent with Parliament's general hesitancy to explicitly prescribe fault. It is also an awkward fit with the current structure of the *Code* because it would be an inappropriate prescription of fault for assault *simpliciter*. Accordingly, this prescription of fault would need to be placed after section 273.2 and limited to the offence of sexual assault.

Alternatively, Parliament could prescribe a subjective-objective *mens rea* for sexual assault by amending the *Code* in the following manner:

Where belief in consent not a defence

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281 *Ibid.*

> **273.2** It is not a defence to a charge under section 271, 272 or 273 that the accused *did not consider whether the complainant was consenting, or* believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief *or failure to consider consent arose* from
> (i) the accused's self-induced intoxication,
> (ii) the accused's recklessness or wilful blindness, or
> (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting, *which is sufficient to prove fault regarding the complainant's absence of consent*; or
> (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.[282]

The proposed amendments to section 273.2 and 273.2(a) address Justice Moldaver's reasons for stating that the accused's failure to take reasonable steps is insufficient to demonstrate fault regarding the absence of consent.[283] Justice Moldaver stated that proof the accused did not take reasonable steps to determine the complainant's age – and therefore the unavailability of the defence of mistaken belief in age – is insufficient to prove the accused's belief that the complainant was underage.[284] This proposed legislative amendment fills the gap between subjective awareness of a risk the complainant is not consenting and the unavailability of the defence of mistaken belief. Failing to have any subjective state of mind regarding consent is no longer an innocent state of mind resulting in an acquittal. Therefore, there is no longer a gap between the failure of the defence of mistaken belief and proving *mens rea*. The unavailability of the defence necessarily means that the accused has a culpable mind.

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282 *Code*, *supra* note 2, s. 273.2.

283 See *Morrison*, *supra* note 7 at paras 84-85. Of course, Moldaver J was discussing fault regarding the complainant's age rather than absence of consent; however, as already discussed, his reasoning is equally applicable to the offence of sexual assault.

284 *Ibid* at para 83.

Accordingly, the further proposed amendment to section 273.2(b) is not necessary to ensure a subjective-objective *mens rea* for sexual assault. The removal of inadvertence towards consent as an innocent state of mind should be sufficient to achieve this result. However, the proposed amendment to section 273.2(b) would provide further clarity regarding the fault element. It would also address Justice Moldaver's comment that the language "[i]t is not a defence…" refers to an affirmative defence in this context. Parliament's explicit indication that the accused's failure to take reasonable steps renders the defence of mistaken belief unavailable *and* proves fault would completely address this concern. Furthermore, it would also provide a strong textual indication that the Crown must always prove the absence of reasonable steps to secure a conviction for sexual assault via the objective pathway. The accused's failure to demonstrate an air of reality to the reasonable steps requirement cannot be the basis for conviction.[285]

CONCLUSION

Morrison is a problematic decision. The Supreme Court's refusal to interpret section 172.1(4) as an articulation of subjective-objective *mens rea* has created needless analytical complexity. This analytical complexity has spread to the law of sexual assault, an already overburdened area of law where legal error can profoundly impact complainants. Furthermore, in an attempt to avoid reading reasonable steps requirements out of the *Code*, courts have interpreted these requirements in a way that infringes the accused's right to be presumed innocent. All of this could have been avoided by adopting a subjective-objective *mens rea*, but *stare decisis* has effectively precluded the adoption of this simple solution. Therefore, it appears that legislative amendment presents the only viable solution. A definitive declaration that the *mens rea* for sexual assault is not purely subjective would be a welcome change to the law.

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[285] *Ibid* at para 85.