

# The Slow Death of the Reasonable Steps Requirement for the Mistake of Age Defence

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I S A B E L   G R A N T \*

## ABSTRACT

This article examines the demise of the “all reasonable steps” requirement in s. 150.1(4) of the *Criminal Code* which limits an accused’s ability to assert a mistaken belief in age as a defence to sexual offences against children where he has failed to take such steps. The article demonstrates that the Court of Appeal for Ontario in *R v Carbone* has rendered this requirement meaningless in Ontario. Even where the Crown has met its burden to prove beyond a reasonable doubt that the accused did not take “all reasonable steps” to ascertain age, the Crown must still go on and prove *mens rea* as to the fact that the complainant was under the age of consent. The article argues that, where there is no suggestion that a legislative provision is unconstitutional, courts should not use statutory interpretation to effectively read a legislative provision out of existence, especially where it was intended to protect children from sexual contact with adults.

## I. INTRODUCTION

**A**dolescents face sexual violence at alarming rates in Canada. In 2012, 55% of complainants in police-reported sexual offences were under the age of 17 even though this group represented only

20% of the population.<sup>1</sup> As the Supreme Court of Canada has acknowledged in the sentencing context, the intersecting vulnerabilities of being young and female result in girls bearing a disproportionate burden of sexual violence against children.<sup>2</sup> The Court went out of its way to describe the particular risks (and stereotypes) facing adolescent girls<sup>3</sup> and to highlight the degree to which the legislative regime enacted to deal with these offences is focused on “the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children.”<sup>4</sup>

But progress in sentencing is meaningless if judges consistently erect new barriers to effective prosecution of child sexual offences. This article addresses the latest such barrier imposed by the Court of Appeal for Ontario in *R v Carbone*.<sup>5</sup> In *Carbone*, the Court held that the requirement in the *Criminal Code* that an accused take “all reasonable steps” to ascertain the complainant’s age before he can raise a defence that he mistakenly believed the child was at or above the age of consent (generally 16 in Canada) will no longer have any impact on the verdict in Ontario. Even where the Crown successfully proves beyond a reasonable doubt that the accused did not take “all reasonable steps”, it must go on to prove that the accused knew the complainant was under the age of consent, or was wilfully blind or reckless with respect to that fact.

This article begins with a brief introduction to the mistake of age defence in Canada and the ways in which courts have slowly chipped away

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\* Professor, Peter A. Allard School of Law, University of British Columbia. The author would like to thank Kelsey Wong, Deborah Trochine, and Katrin Iacono for their diligent research assistance on this paper and Janine Benedet and Elizabeth Sheehy for their helpful comments on earlier drafts. This research was supported by a grant from the Social Sciences and Humanities Research Council.

<sup>1</sup> See Statistics Canada, *Police-Reported Sexual Offences Against Children and Youth in Canada, 2012*, by Adam Cotter & Pascale Beaupré, Catalogue No 85-002-X (Ottawa: Statistics Canada, 28 May 2014) at 6. In 2016, 50% of all female complainants in police-reported sexual offences were under the age of 17, with the majority (34%) being between the ages of 12 to 17 years-old. That same year, 73% of all male complainants in police-reported sexual offences were under the age of 17, with 42% being under the age of 12 and 30% being adolescents. See Statistics Canada, *Victims of Police-Reported Violent Crime in Canada: National, Provincial and Territorial Fact Sheets, 2016*, by Mary Allen & Kylie McCarthy, Catalogue No 85-002-X (Ottawa: Statistics Canada, 30 May 2018) at 7.

<sup>2</sup> See *R v Friesen*, 2020 SCC 9 at para 68.

<sup>3</sup> See *ibid* at para 136.

<sup>4</sup> *Ibid* at para 51.

<sup>5</sup> 2020 ONCA 394 [*Carbone*].

at its effectiveness. It then moves on to provide a brief review of the problematic decision of the Supreme Court of Canada in *R v Morrison*<sup>6</sup> to set up the more detailed analysis of the decision in *Carbone*, the final death knell for reasonable steps regarding age in Ontario. The article argues that the Court of Appeal for Ontario had a choice to make in *Carbone* and chose the path that fully undermined the “all reasonable steps” requirement.

Sexual assault is gendered across all ages and especially so in adolescence.<sup>7</sup> One study found that under the age of 11, girls experience sexual violence at a rate almost triple that of boys; for girls between the ages of 12 and 17, that rate jumps to nine times higher than boys.<sup>8</sup> Indigenous girls,<sup>9</sup> girls with disabilities,<sup>10</sup> and girls in state care<sup>11</sup> are particularly vulnerable to sexual violence. Furthermore, sexual assault against boys peaks at a younger age than for girls. Specifically, sexual abuse against boys peaks

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<sup>6</sup> 2019 SCC 15 [*Morrison* (SCC)].

<sup>7</sup> For example, from 2009 to 2014, 87% of all police-reported sexual assaults were committed against females and 98% of perpetrators charged were male. See Statistics Canada, *Police-Reported Sexual Assaults in Canada, 2009 to 2014: A Statistical Profile*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 3 October 2017) at 19. This overrepresentation is also seen in adolescents. See Cotter & Beaupré, *supra* note 1 at 10 (which found that the rate of sexual assault peaks around the age of 14).

<sup>8</sup> See Statistics Canada, *Police-Reported Violence Against Girls and Young Women in Canada, 2017*, by Shana Conroy, Catalogue No 85-002-X (Ottawa: Statistics Canada, 17 December 2018) at 6.

<sup>9</sup> See British Columbia, Representative for Children and Youth, *Too Many Victims: Sexualized Violence in the Lives of Children and Youth in Care* (report) (Victoria: Representative for Children and Youth, October 2016) at 1. This report concluded that Indigenous girls in care were more likely to experience sexual abuse than other girls and that the same was not true for Indigenous boys. See also Statistics Canada, *Victimization of Aboriginal People in Canada, 2014*, by Jillian Boyce, Catalogue No 85-002-X (Ottawa: Statistics Canada, 28 June 2016) at 10.

<sup>10</sup> See Statistics Canada, *Violent Victimization of Women with Disabilities, 2014*, by Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 15 May 2018) at 9: Women with a disability at the time of the survey were more likely to have experienced sexual abuse at the hands of an adult before they reached 15 years of age (Chart 4). One in five (18%) women with a disability were touched in a sexual way by an adult before the age of 15, a proportion that was double that of women without a disability (9%). Likewise, 12% of women with a disability reported being forced into unwanted sexual activity by an adult before the age of 15, compared with 5% of women without a disability.

<sup>11</sup> See Isabel Grant & Janine Benedet, “The ‘Statutory Rape’ Myth: A Case Law Study of Sexual Assaults Against Adolescent Girls” (2019) 31:2 CJWL 266 at 280–81.

under the age of 12,<sup>12</sup> whereas for girls sexual abuse peaks around the age of 14,<sup>13</sup> just the age where a mistake of age defence might be more plausible.

In fact, this gendered dynamic is clearly reproduced in the mistake of age case law. I examined 20 years of reported case law (between 2000 and 2020) across Canada on mistake of age defences, including all cases where there was an actual child complainant.<sup>14</sup> This review revealed 117 reported cases involving the defence. More than 96% of cases involved male perpetrators, with only four cases involving female perpetrators.<sup>15</sup> Similarly, 107 cases involved girls as complainants (91%), and 10 cases involved boys (9%), including one case where the 15-year-old complainant was “in the process of transitioning to becoming a male” and identified as male.<sup>16</sup> The

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<sup>12</sup> See Cotter & Beaupré, *supra* note 1 at 10 (which found that in 2012 “[t]he peak age at which boys were victims of sexual offences was 8”). 73% of all male complainants in police-reported sexual offences in 2016 were under the age of 17, with the largest group, 42%, being under the age of 12. See Allen & McCarthy, *supra* note 1 at 7.

<sup>13</sup> See Cotter & Beaupré, *supra* note 1 at 11: “[f]or girls, the rates of sexual offences generally increased with age before peaking at age 14”.

<sup>14</sup> I excluded five cases involving Internet luring involving a police sting operation and thus no actual child victim. I also excluded cases where no outcome on the defence was reached.

<sup>15</sup> See *R v George*, 2017 SCC 38 [*George* (SCC)]; *R v Johnson*, [2001] NJ No 276, 52 WCB (2d) 456 [*Johnson*]; *R v Otokiti*, 2017 ONSC 5940 [*Otokiti*]; *R v Akumu*, 2017 BCSC 527 [*Akumu*].

*R v WG*, 2018 ONSC 5404 at para 5. The complainant was described as identifying as a male at the time of the sexual offences. The defence was unsuccessful in this case on the basis that the accused had not taken all reasonable steps to ascertain the complainant’s age. The other cases involving boys are: *George* (SCC), *supra* note 15; *Johnson*, *supra* note 15; *R v TSH*, 2008 ABPC 281 [*TSH*]; *R c Lévesque*, 2011 QCCS 7093; *R v Angel*, 2019 BCCA 449 [*Angel*]; *R v Thompson*, 2017 NBCA 62; *R v Sohail*, 2018 ONCJ 566; *R v Crant*, 2018 ONSC 1479 [*Crant*]; *R v LFM*, 2015 BCPC 449 [*LFM*]. For all of the cases involving female complainants, see: *Otokiti*, *supra* note 15; *Akumu*, *supra* note 15; *Carbone*, *supra* note 5; *R v Normand*, 2014 ONSC 3861 [*Normand*]; *R v Crosdale*, 2018 ONCJ 800; *R v Jat*, 2019 SKQB 51; *R v Hope*, 2011 NLTD(G) 143 [*Hope*]; *R v John*, 2020 ONSC 3790 [*John*]; *R v ET*, 2010 ONSC 3913 (CanLII) [*ET*]; *LSJPA – 1731*, 2017 QCCQ 15023; *R v Abdulkadir*, 2018 ABPC 244; *R v A(D)*, 2011 ONCJ 130; *R v CGJ*, 2018 BCPC 216; *R v Ayer*, [2008] OJ No 3611, 2008 CanLII 46922; *R c Bourelle Vanasse*, 2020 QCCQ 2315; *R v PDB*, 2000 SJ No 348; *R v Purchase*, 2011 ABQB 643; *R v NW*, [2005] MH No 108, 4 WWR 304; *R v Dunchie*, 2007 ONCA 887; *R v Nakogee*, 2017 ONSC 4885; *R v Moazami*, 2014 BCSC 1727; *R v RKD*, 2012 ABPC 205; *R v Poirier*, 2011 ABPC 350 [*Poirier*]; *R v Singh et al*, 2020 MBCA 61; *R v HL*, 2017 ONSC 6205; *R v Saliba*, 2019 ONCA 22; *R v Kim*, 2004 BCCA 57 [*Kim*]; *R v Gonzales*, 2011 BCPC 353; *R v Skunk*, 2010 ONCJ 209; *R v DRD*, 2020 ABPC 46; *R v Konneh*, 2019 ABQB 3; *R v Silavi*, 2019 BCCA 366; *R v Duran*, 2013 ONCA 343 [*Duran*]; *R v Coburn*,

gendered stereotypes underlying this defence are most evident in cases involving successful defences. There were only three reported cases involving boys where the defence was successful, and none involving complainants who were identified in the decision as transgender or nonbinary.<sup>17</sup> By contrast, there were 34 cases involving girls where the defence was successful and three additional cases where an appellate court overturned a conviction on the basis of errors regarding the defence. While these reported cases probably represent only a fraction of the actual cases involving the defence during this time period, it is notable that the gender breakdown is remarkably similar to statistics on sexual violence generally.

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2019 NSPC 49 [Coburn]; *R v Wrigley*, 2018 NWTSC 67 [Wrigley]; *R v Chapais*, 2017 ONSC 120 [Chapais]; *R v MB*, 2017 ONSC 4163; *R v Ryder*, 2011 BCSC 133; *R v Beckford*, 2016 ONSC 1066; *R v Hubert*, 2016 BCPC 288; *R v Holloway*, 2013 ONCA 374 [Holloway]; *R v Arook*, 2016 ABQB 528; *R v Ekendia*, 2011 NWTTC 17; *R v Audet*, 2020 ONSC 5039; *R v Azonuwanna*, 2020 ONSC 1513; *R v Hudon*, 2010 OJ No 6023; *R v Merriles*, 2016 SKCA 128; *R v Gashikanyi*, 2015 ABCA 1; *R v Piche*, 2018 ABQB 980; *R v Lefthand*, 2019 ABPC 127 [Lefthand]; *R v UHC*, 2015 NSPC 10; *R v DO*, 2017 ONSC 2027 [DO]; *R v E*, 2011 NUCJ 35 [R v E]; *R v Quinones*, 2012 BCCA 94; *R v (R)*, 2014 ONCJ 96 [R v (R)]; *R v Mabior*, 2010 MBCA 93; *R v MGB*, 2005 ABPC 215; *R v JM*, [2017] NJ No 223, 2017 NLTD(G) 110; *R v Budden*, 2014 NJ No 78; *R v Young*, [2010] NJ No 264, 2010 CarswellNfld 421; *R v Ross*, 2012 NSCA 56; *R v Hussein*, 2017 ONSC 2584; *R v GL*, 2014 ONSC 3403; *R v Dragos*, 2012 ONCA 538 [Dragos]; *LSJPA – 1728*, 2017 QCCQ 13555; *R v Tannas*, 2015 SKCA 61 [Tannas]; *R v Eichner*, 2020 ONSC 4602; *R v Ford*, 2017 ABQB 542; *R v Dichrow*, 2020 ABPC 58; *R c Vasiloff*, 2017 QCCQ 15612 [Vasiloff]; *R c Perreault*, 2019 QCCQ 6097; *R v Sims*, 2006 BCSC 651; *R v JTC*, 2013 NSPC 88; *R v TQBN*, 2016 SKQB 10 [TQBN]; *R v Nguyen*, 2017 SKCA 30 [Nguyen]; *R v Alfred*, 2020 BCCA 256 [Alfred]; *R v MacLean*, 2018 NLSC 209; *R v May*, 2017 ONCJ 167; *R v Craig*, 2013 BCSC 1562; *R v Gale*, 2012 BCPC 456; *R v MC*, [2011] NJ No 228, 95 WCB (2d) 543; *R v Garaway*, 2010 ONCJ 642; *R v Mangat*, 2018 ABCA 309; *R v Slater*, 2005 SKCA 87; *R v Chapman*, 2016 ONCA 310 [Chapman]; *R v Saliba*, 2013 ONCA 661 [Saliba (2013)]; *R v CJJ*, 2020 BCPC 2; *R v Cummer*, 2014 MBQB 62; *R v CJC*, 2018 NLCA 68; *R v KS*, 2018 ONSC 1988; *R v CIL*, 2019 ABPC 64; *R v Martinez*, 2020 ONCJ 303; *R v CGV*, 2017 ONCJ 850; *R c Héon*, 2019 QCCQ 5609; *R v Minzen*, 2017 ONCJ 127 [Minzen]; *R v Akinsuyi*, 2016 ONSC 2103; *R v Hall*, 2018 ABQB 459; *R v Powell*, 2016 ONSC 562; *R v Clarke*, 2016 SKCA 80; *R v Beaulieu*, 2016 ONCJ 280; *R v Moise*, 2016 SKCA 133; *R v Hoffart*, 2010 ABPC 122; *R v D(AJ)*, 2016 NSPC 74; *R v Ambnis*, 2014 ABPC 173; *R v Mastel*, 2011 SKCA 16; *R c Naud*, 2018 QCCQ 4480; *R v Lewis*, 2015 SKQB 291 [Lewis].

<sup>17</sup> See *George* (SCC), *supra* note 15; *TSH*, *supra* note 16; *LFM*, *supra* note 16. The success rate for the defence was slightly higher among girl complainants, but with the small number of cases involving boys it is impossible to draw any conclusions from this finding.

This article argues that while *Carbone* applies to all children under the age of consent, it will have its greatest impact on the most marginalized girls. This argument is not meant to trivialize sexual violence against boys or those who identify as gender nonbinary; both groups face significant harm from sexual violence committed overwhelmingly by men,<sup>18</sup> and further study is warranted to identify the stereotypes that can undermine judicial decision making around these child victims. However, the cases under study predominantly involve male violence against girls and, as will be discussed below, the stereotypes invoked to support successful defences of mistaken belief in age are also uniquely gendered. These stereotypes sexualize girls and portray them as older and thus as sexually available to men.

## II. THE MISTAKE OF AGE DEFENCE

In 1987, Parliament revised its structure of sexual offences against children and enacted a number of new offences such as sexual interference and invitation to sexual touching.<sup>19</sup> In these prosecutions, age is substituted for non-consent; once the Crown proves the young age of the complainant,

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<sup>18</sup> Between 2009 and 2014, boys accounted for 50% of male victims of police-reported sexual assaults. See Rotenberg, *supra* note 7 at 13–14. In 2012, perpetrators of sexual assault against boys were overwhelmingly male, with only 2% of cases involving a female accused and a male victim. See Cotter & Beaupré, *supra* note 1 at 14. A Canadian study conducted by the Department of Justice reported that childhood sexual abuse can have “profound effects on a man’s identity and sexual activity”: Susan McDonald & Adamira Tijerino, “Male Survivors of Sexual Abuse and Assault: Their Experiences” (2013) at 7, online (pdf): *Department of Justice* <[www.justice.gc.ca/eng/rp-pt/cj-jp/victim/rr13\\_8/rr13\\_8.pdf](http://www.justice.gc.ca/eng/rp-pt/cj-jp/victim/rr13_8/rr13_8.pdf)> [perma.cc/K2UJ-GJGJ]. See also Marie Choquet et al, “Self-Reported Health and Behavioral Problems Among Adolescent Victims of Rape in France: Results of a Cross-Sectional Survey” (1997) 21:9 *Child Abuse & Neglect* 823 at 831. A more recent American study found that boys who had experienced childhood sexual abuse were more than twice as likely as boys who had not experienced sexual abuse to have attempted suicide. See Shanta R Dube et al, “Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim” (2005) 28:5 *Am J Prev Med* 430 at 433. There is also evidence to suggest that children who identify as transgender or nonbinary face a high rate of sexual violence. See Karen Rosenberg, “Higher Prevalence of Sexual Assault Among Transgender and Nonbinary Adolescent Students” (2019) 119:8 *American J Nursing* 49. See also Andrea L Roberts et al, “Childhood Gender Nonconformity: A Risk Indicator for Childhood Abuse and Posttraumatic Stress in Youth” (2012) 129:3 *Pediatrics* 410 at 414.

<sup>19</sup> See *An Act to Amend the Criminal Code and the Canada Evidence Act*, SC 1987, c 24; *Criminal Code*, RSC 1985, c C-46, ss 151, 152 [Code].

it need not prove non-consent in order to obtain a conviction.<sup>20</sup> Prior to this new regime, a defence that an accused was mistaken about the complainant's age was expressly prohibited by the *Criminal Code*.<sup>21</sup> The 1987 reforms included a new limited defence of mistaken belief in age in s. 150.1(4) to respond to criticisms that the previous offence was effectively one of absolute liability and thus risked being invalidated under s. 7 of the *Charter*.<sup>22</sup>

The mistaken belief in age defence enacted in s. 150.1(4) allows an accused to raise a mistaken belief that the complainant was at or above the age of consent, but the defence will only be successful where the accused has taken "all reasonable steps" to ascertain the complainant's age. This provision was modelled on the reasonable steps provision for consent for sexual offences against adults,<sup>23</sup> but there were some crucial differences. First, the reasonable steps provision dealing with consent in the context of adult complainants only requires the accused to take reasonable steps and not all reasonable steps. Second, the reasonable steps provision dealing with consent only requires the accused to take reasonable steps "in the circumstances known to the accused at the time".<sup>24</sup> Parliament clearly made the decision that a more stringent standard was warranted for child victims of sexual offences.

The purpose of the "all reasonable steps" requirement was to prevent adults from asserting that they were mistaken about the complainant's age where they had failed to do everything reasonably possible to avoid having sex with a child. The common law had allowed men to rely on mistaken beliefs in consent that were unreasonable so long as they were honestly held – which was precisely why Parliament enacted reasonable steps provisions.<sup>25</sup> Section 150.1(4), like other reasonable steps provisions, modifies that common law position.

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<sup>20</sup> See *Code*, *supra* note 19, s 150.1(1).

<sup>21</sup> See *Criminal Code*, RSC 1970, c C-34, s 146 (1).

<sup>22</sup> *Canadian Charter of Rights and Freedoms*, s7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. See e.g. *R v Hess*, [1990] 2 SCR 906, 59 CCC (3d) 161; *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536.

<sup>23</sup> See *Code*, *supra* note 19, s 273.2(b).

<sup>24</sup> *Ibid*.

<sup>25</sup> See *Pappajohn v The Queen*, [1980] 2 SCR 120 at 156, 111 DLR (3d) 1. See also *An Act to Amend the Criminal Code (Sexual Assault)*, SC 1992, c 38.

There are a number of reasonable steps provisions with respect to age in the *Criminal Code* that have been enacted since 1987, most of which require the accused to take “all reasonable steps” while others simply require “reasonable steps”.<sup>26</sup> In 2008, Parliament raised the age of consent for most sexual offences against children from 14 years of age to 16, but the age may be as high as 18 for certain offences<sup>27</sup> and as low as 12 where the accused is close in age to the complainant.<sup>28</sup> A large majority of the reported decisions involve adolescent girl complainants between the ages of 12 and 15, but there are at least five reported cases since 2000 involving girls as young as 11,<sup>29</sup> and one luring and child pornography case involving a 9-year-old girl where mistaken belief in age was raised.<sup>30</sup>

Courts have consistently interpreted reasonable steps provisions regarding age and consent as putting no burden of proof on the accused.<sup>31</sup> Rather, once the accused raises an air of reality that he was mistaken and that he had taken “all reasonable steps” to ascertain age, the burden of proof remains on the Crown to prove beyond a reasonable doubt that the accused did not take all reasonable steps.<sup>32</sup> Once the Crown has met that stringent

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<sup>26</sup> See e.g. *Code*, supra note 19, ss 150.1(4), (5), (6), 163.1(5) (requiring “all reasonable steps”), and ss 171.1(4), 172.1(4), 172.2(4) (requiring only “reasonable steps”).

<sup>27</sup> See *ibid*, ss 153(2) (sexual exploitation), 163.1(1) (child pornography). Obtaining sexual services for consideration is subject to a higher penalty where sexual services are obtained from someone below the age of 18. See *ibid*, s 286.1(2).

<sup>28</sup> See *ibid*, s 150.1(2).

<sup>29</sup> See *Hope*, supra note 16; *Lefthand*, supra note 16; *Normand*, supra note 16; *John*, supra note 16; *ET*, supra note 16. The youngest male complainants in cases involving the mistaken belief in age defence in this time period were both 13 years of age. See *Crant*, supra note 16; *TSH*, supra note 16. The law is unclear as to whether an accused can argue mistaken belief to bring a complainant within the close in age exceptions rather than the age of consent. For example, can an 18-year-old male argue he mistakenly believed he was having sex with a 15-year-old (to bring him within the close in age exceptions) when in fact the complainant was 12? See 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 14–15 [Grant & Benedet, “Mistake of Age”].

<sup>30</sup> See *Otokiti*, supra note 15, where the female accused argued mistaken belief in age about a nine-year-old girl who was lured online.

<sup>31</sup> See e.g. *R v Westman*, [1995] BCJ No 2124 at para 20, 28 WCB (2d) 440 (CA) [*Westman*]; *R v Osborne* (1992), 102 Nfld & PEIR 194 at paras 44–47, 17 WCB (2d) 581 (CA) [*Osborne*].

<sup>32</sup> There was some lack of clarity as to whether the air of reality threshold applied only to the mistaken belief or whether it applied to having taken reasonable steps as well. It was settled in *R c Gagnon*, 2018 CMAC 1 at para 28, aff'd 2018 SCC 41 [*Gagnon* (CMAC)]

burden, the accused is precluded from arguing that he had a mistaken belief.<sup>33</sup> In other words, the reasonable steps requirement puts a limit on when an accused could raise the defence of mistaken belief in age. The decision of the Supreme Court in *Morrison*, which was extended further in *Carbone*, has now brought this case law into question.

Isabel Grant and Janine Benedet have demonstrated the degree to which courts have gradually whittled away at the reasonable steps requirement.<sup>34</sup> First, the requirement that an accused take “all” reasonable steps has been effectively read out of s. 150.1(4), such that provisions requiring “all reasonable steps” are applied in the same way as those requiring only “reasonable steps”.<sup>35</sup> Second, courts have read into s. 150.1(4) the requirement from the provision dealing with consent that an accused must only take reasonable steps in the circumstances that are known to him at the time,<sup>36</sup> despite the fact that Parliament clearly made a decision not to limit reasonable steps regarding age in this way. Third, as Grant and Benedet have demonstrated, some courts have held that the surrounding circumstances may require the accused to do absolutely nothing in order to satisfy having taken “all reasonable steps”.<sup>37</sup> Sometimes, how the complainant looks or behaves is sufficient to obviate the need to

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that it applies to both. It is noteworthy that the accused must point to an air of reality for many defences, including some that go to *mens rea*, such as the intoxication defence. See *R v Cinous*, 2002 SCC 29 at para 57.

<sup>33</sup> See e.g. *R v Morrison*, 2017 ONCA 582 at para 95 [*Morrison* (CA)]; *R v LeVigne*, 2010 SCC 25 at para 36 [*LeVigne*]. Justice Abella, who would have struck down the reasonable steps test in *Morrison* (SCC), *supra* note 6, agreed with the interpretation of the Court of Appeal for Ontario that once the Crown has met its burden of disproving reasonable steps beyond a reasonable doubt, the accused is precluded from raising the defence of mistaken belief in age. See *Morrison* (SCC), *supra* note 6 at para 207. See also Hamish Stewart, “Fault and ‘Reasonable Steps’: The Troubling Implications of *Morrison* and *Barton*” (2019) 24:3 Can Crim L Rev 379 at 381 (describing a reasonable steps provision as providing “an alternative route by which the Crown can prove the fault element of the offence”).

<sup>34</sup> See generally Grant & Benedet, “Mistake of Age”, *supra* note 29.

<sup>35</sup> See *Angel*, *supra* note 16 at para 46.

<sup>36</sup> See e.g. *Morrison* (SCC), *supra* note 6 at para 105; *R v Thain*, 2009 ONCA 223 at para 37 [*Thain*]; *Dragos*, *supra* note 16 at paras 35–41; *R v Ghotra*, 2016 ONSC 1324 at paras 153–54; *R v Pengelley*, 2010 ONSC 5488 at paras 8–17 [*Pengelley*]; *R v E*, *supra* note 16 at paras 32, 96–97; *Tannas*, *supra* note 16 at paras 22, 25, 28.

<sup>37</sup> See Grant & Benedet, “Mistake of Age”, *supra* note 29 at 23–31.

take any steps at all, let alone “all reasonable steps”.<sup>38</sup> These cases sometimes involve men whose mistakes are based on stereotyped beliefs about the sexual availability of girls who look or behave in certain ways rather than on actual knowledge of the complainant’s age. A finding that these men have to do nothing to ascertain age legitimizes these stereotypes and acquits men on the basis of them. Together these developments in statutory interpretation have undermined Parliament’s clear language and its intent to protect child victims from sexual activity with adults. All of this has been done without resort to the *Charter*. Thus, the “all reasonable steps” requirement in s. 150.1(4) had already been substantially weakened by the time of *Carbone*.

There is one final point worth making about the mistake of age defence. The mistake of age defence is only relevant where the complainant has agreed to participate in sexual activity with the accused. If the complainant did not agree to participate in sexual activity, it does not matter what belief the accused had about her age – that is sexual assault. However, in many of the reported cases, the complainant testified that such agreement was not given, and the accused testified that the complainant did agree to engage in sexual activity and that he thought she was above the age of consent. In 44 of the 117 reported cases (38%) involving a defence of mistaken belief, the complainant testified to a lack of agreement to participate in sex.<sup>39</sup> In more than one-third of the cases in which the defence of mistaken belief was ultimately successful, the complainant testified that no such agreement was present.<sup>40</sup> The mistake of age defence thus has the potential to shift the judicial narrative in these cases. It no longer becomes a question of has the Crown proven that the child did not agree to participate in sexual activity but rather, assuming she agreed to participate in sex, has the Crown negated that the accused took all reasonable steps to ascertain age. The complainant’s allegations of non-consent may disappear from the case entirely.<sup>41</sup>

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<sup>38</sup> See e.g. *Tannas*, *supra* note 16 at paras 27, 34–35; *R v LTP*, [1997] BCJ No 24 at para 20, 33 WCB (2d) 292 [*R v LTP*]; *R v Mastel*, 2010 SKPC 66 at paras 28–30 [*Mastel* (SKPC)].

<sup>39</sup> This figure was slightly higher in cases involving female complainants (38%) than in cases involving male complainants (30%).

<sup>40</sup> This was the case in 14 of the 37 cases in which the defence was successful, 12 involving girls as complainants and two involving boys.

<sup>41</sup> See e.g. *Holloway*, *supra* note 16 at paras 12–14 (discussing the trial judge’s failure to adequately consider whether there had been “consent” on the part of the complainant).

Before turning to the details of *Carbone*, it is necessary to briefly review the decision in *Morrison* – a 2019 decision of the Supreme Court of Canada which created the potential to further undermine reasonable steps provisions. Without *Morrison*, a decision scholars and courts have struggled to interpret, this issue would not have been considered in *Carbone* after years of clarity about how reasonable steps provisions operate.<sup>42</sup>

### III. THE IMPACT OF *R v MORRISON*

At issue in *Morrison* were the evidentiary presumption and the reasonable steps provision associated with the crime of Internet luring of children in s. 172.1(3) and (4) of the *Criminal Code*, respectively. Internet luring in s. 172.1(1) is an unusual crime because it can be committed in two distinct ways, both defined by the same subsection of the *Criminal Code*. An accused can be convicted for luring an actual child online or for luring someone the accused believes to be a child, which usually arises in the context of an undercover police officer pretending to be a child. *Morrison* itself involved a police sting operation in which the 67-year-old accused was charged with luring an undercover police officer who was holding herself out as a 14-year-old girl. The luring jurisprudence lacked clarity on the fact that the *Criminal Code* set out different elements for the two different ways in which the crime could be committed.<sup>43</sup> Where the accused lures someone who is falsely holding herself out to be a child, the legislation requires that the accused “believe” he is communicating with a child. No such requirement of belief is set out in the legislation where the accused is luring an actual child, and principles of statutory interpretation would normally allow recklessness as sufficient *mens rea* in this situation.<sup>44</sup>

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The Court noted, at para 15, that “[a] finding that the sexual conduct was not ‘forced’ was not enough to determine whether, apart from the question of the complainant’s age, there was a potentially operative consent.”

<sup>42</sup> See e.g. Isabel Grant & Janine Benedet, “Unreasonable Steps: Trying to Make Sense of *R v Morrison*” (2019) 67 Crim LQ 14 [Grant & Benedet, “Unreasonable Steps”]; Stewart, *supra* note 33; Don Stuart, “*R v Carbone*”, Case Comment, (2020) 64 CR (7th) 1. Professor Stuart describes *Morrison* as a “lengthy, complex and perplexing” decision and urges the Supreme Court to reconsider its decision. He describes both *Morrison* and *Carbone* as “hard to follow or accept”. See also Angel, *supra* note 16; *Carbone*, *supra* note 5.

<sup>43</sup> See *R v Legare*, 2009 SCC 56; *Levigne*, *supra* note 33.

<sup>44</sup> See *Regina v Buzzanga and Durocher*, 25 OR (2d) 705, 101 DLR (3d) 488 (Ont CA); *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299, 40 CCC (2d) 353.

The reasonable steps provision in s. 172.1(4), the wording of which mirrors other reasonable steps provisions, does not acknowledge that this crime can be committed in different ways. There are differences between a man who asserts he wrongly believed he was talking to an adult (when he was in fact talking to a child), and a man who asserts he believed he was talking to an adult, and was in fact doing so, albeit an adult who was pretending to be a child. In the latter scenario, the provision is effectively requiring the accused to take reasonable steps to confirm that he is in fact talking to an adult before he can say he disbelieved a representation that he was engaging with a child. The mandatory evidentiary presumption in s. 172.1(3) complicated this analysis by presuming, where the person represented themselves as a child, that the accused believed he was talking to a child. In other words, in virtually every case involving an undercover officer, the accused was deemed to believe that he was communicating with a child unless he could raise evidence to the contrary, even though he was in fact communicating with an adult. In some cases, that evidence to the contrary was an accused arguing that he was role-playing, or that he believed he was talking to an adult who was pretending to be a child, for the purposes of sexual gratification.<sup>45</sup> The luring provisions were added to the *Criminal Code* in 2002,<sup>46</sup> and it appears that no thought was given to how the reasonable steps provision would actually work where the accused correctly believed he was talking to an adult.

The Supreme Court in *Morrison* was unanimous in striking down the evidentiary burden as contrary to s. 11(d) of the *Charter* and not saved by s. 1. The dissenting judgment of Justice Abella would have also struck down the reasonable steps provision under s. 7 of the *Charter*. However, Justice Abella was clear on how reasonable steps provisions work generally and on the fact that once the Crown had negated reasonable steps beyond a reasonable doubt, the accused cannot assert an honest but mistaken belief. Justice Abella would have invalidated the provision as violating an accused's right to full answer and defence because, in her view, it is almost impossible to ascertain identity on the Internet, let alone age, given the anonymous nature of online communications and the potential for deception. Further, according to Justice Abella, an accused who takes steps to ascertain age by, for example, asking the complainant for a photograph enhances his risk of being charged with luring because those very steps could be evidence of

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<sup>45</sup> See e.g. *Morrison* (SCC), *supra* note 6 at para 24.

<sup>46</sup> See *Criminal Law Amendment Act, 2001*, SC 2002, c 13, s 8.

luring.<sup>47</sup> The approach of Justice Abella failed to recognize that talking to children online is only criminalized under s. 172.1 where it is done for the purpose of facilitating the commission of (almost always) a further sexual offence.<sup>48</sup> Merely talking to a child online about sex, where the accused has no purpose to facilitate a further offence, is not criminalized as Internet luring under s. 172.1. A man who is unable to ascertain the age of the person with whom he is speaking can simply desist from pursuing any further sexual purpose until he has a more meaningful opportunity to ascertain age.<sup>49</sup>

It is the judgment of Justice Moldaver for the majority that has led to considerable problems for other reasonable steps provisions. The majority avoided striking down the reasonable steps provision in s. 172.1(4) by effectively interpreting it out of existence for the crime of Internet luring. The majority held that, even where the Crown had proven beyond a reasonable doubt that the accused had not taken reasonable steps, the Crown would still have to prove beyond a reasonable doubt that the accused believed he was talking to a child.<sup>50</sup> This reasoning was largely driven by the requirement in s. 172.1(1) that, where the accused was not talking to an actual child, he must have *believed* he was talking to a child.

The majority repeatedly limited its analysis to the sting operation context where the accused's belief is an element of the offence.<sup>51</sup> It did so precisely because, in the police sting context, there is no actual child being harmed and the accused's moral blameworthiness lies in his belief that he is talking to a child.<sup>52</sup> For other sexual offences against actual children, recklessness is sufficient *mens rea*.<sup>53</sup> The sting context is unique because without a belief that he is talking to a child, the accused has done nothing wrong, at least if one assumes there is nothing wrong in role-playing the sexual abuse of children.<sup>54</sup>

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<sup>47</sup> See *Morrison* (SCC), *supra* note 6 at paras 220–23.

<sup>48</sup> Abduction of a person under the age of 14 is also included as one of the further offences in s. 172.1. See *Code*, *supra* note 19, s 172.1.

<sup>49</sup> See Grant & Benedet, “Mistake of Age”, *supra* note 29 at 31–35.

<sup>50</sup> See *Morrison* (SCC), *supra* note 6 at paras 82–83.

<sup>51</sup> See *Morrison* (SCC), *supra* note 6 at paras 49, 55, 81, 84–85, 95, 101.

<sup>52</sup> See *ibid* at paras 13, 49, 55. See also *Morrison* (CA), *supra* note 33 at para 101.

<sup>53</sup> See *Westman*, *supra* note 31 at paras 18–19; *Kim*, *supra* note 16 at paras 78–88; *Nguyen*, *supra* note 16 at para 14.

<sup>54</sup> Grant and Benedet have argued that it is not harmless for men to condition a sexual response to the abuse of children. See Grant & Benedet, “Unreasonable Steps”, *supra* note 42 at 25.

*Morrison* rendered the reasonable steps provision for Internet luring meaningless. Grant and Benedet have argued that the decision leaves no room for the reasonable steps requirement to have any impact on the verdict:

If the trier of fact does not have a reasonable doubt that the accused believed the complainant was underage, he will be convicted. If the trier of fact has a reasonable doubt about the accused's belief, the accused is acquitted even though he did not take reasonable steps. Reasonable steps are irrelevant to the verdict, which depends entirely on whether the Crown can prove the accused believed he was talking to an underage child.<sup>55</sup>

The *Morrison* majority went out of its way to limit its judgment to Internet luring in the context of a police sting operation. The Court of Appeal for Ontario, therefore, had a choice in *Carbone* about whether to accept the majority at its word that *Morrison* was limited to the sting context or to undermine the “all reasonable steps” requirement in other *Criminal Code* provisions dealing with mistakes about age. It is to the decision in *Carbone* that this article now turns.

#### IV. THE DECISION IN *R V CARBONE*

##### A. Background

The accused in *Carbone* was convicted at trial of invitation to sexual touching. The evidence presented by the Crown was that three 14-year-old girls reached out to the accused on Facebook asking him if he would give them tattoos in exchange for sex. They negotiated that one of the girls would give him “a blow job” before he did the tattooing and another would have intercourse with him after he finished the tattoos.<sup>56</sup> The complainant, HJ, testified that soon after she arrived at the accused's home, she went upstairs with Carbone, performed oral sex on him, and then each of the girls was given a tattoo. HJ testified that when she was performing oral sex, she saw that the accused had a tattoo on his penis. While the accused did spend some time alone with HJ's friend KM afterwards, KM refused to testify and thus there was no evidence about what happened after the tattooing. Later that evening, HJ received a Facebook message from someone she assumed to be the accused saying, “H. that was amazing. Best I ever had. Gold

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<sup>55</sup> *Ibid* at 28 [footnotes omitted].

<sup>56</sup> See *Carbone*, *supra* note 5 at para 6.

medal.”<sup>57</sup> HJ also testified that the accused did not ask her how old she was, nor whether she had permission from her parents to get a tattoo. Another girl, AG, confirmed much of HJ’s testimony and added that HJ had told the accused the true ages of the girls, although that was not part of HJ’s testimony.

The 31-year-old accused also testified. He operated a licensed tattoo parlour out of his home where he lived with his fiancée.<sup>58</sup> He testified that the girls had approached him to exchange sex for tattoos, but that he had told them each tattoo would cost \$35 and that he had staunchly rejected their offers.<sup>59</sup> He testified that he was never alone with any of the girls and that his fiancée came home after he had tattooed the first two girls, a fact which the girls denied. When he demanded money from the girls, they told him their mother would come by later and pay him. When the mother did not appear, the accused testified that he called HJ and told her that if she did not pay him, he would contact her parents and go to the police.<sup>60</sup> He testified that HJ assured him that she would pay him by Friday. On Friday morning, the police arrived at Carbone’s home and arrested him. He testified that he initially thought he was being arrested for tattooing underage girls.<sup>61</sup> While the girls testified that he did not ask their age, he testified that they told him on Facebook they were 16 and that he had seen a permission slip signed by somebody he assumed to be a parent, although he could not produce it.<sup>62</sup> He admitted that he did think it was strange that three girls the same age would have the same mother, but he did not ask any questions about this.<sup>63</sup> He testified that he was not able to produce any of the Facebook messages “because his fiancée had destroyed them after he was arrested.”<sup>64</sup>

After his fiancée testified to corroborate his account, the defence recalled the accused at which point he mentioned for the first time that he had told the girls that he had a tattoo “on his ‘crotch’” because one of the girls was worried the tattoo was going to hurt. He said he wanted to reassure

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<sup>57</sup> *Ibid* at para 11.

<sup>58</sup> See *ibid* at para 16.

<sup>59</sup> *Ibid* at paras 17–18.

<sup>60</sup> *Ibid* at para 22.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid* at paras 21, 23–24.

<sup>63</sup> *Ibid* at para 21.

<sup>64</sup> *Ibid* at para 18.

her that where she was getting tattooed would be less painful than the one on his crotch had been.<sup>65</sup>

The trial judge convicted the accused. The judge believed beyond a reasonable doubt that the accused had agreed to give the complainant a tattoo in exchange for oral sex, that the complainant had performed oral sex on him, and that the accused had not taken the requisite “all reasonable steps” to assert a defence of mistaken belief in age.<sup>66</sup>

The Court of Appeal ordered a new trial primarily on the basis that the trial judge had made a number of errors regarding burden of proof. The trial judge stated that he was “not convinced” by the accused’s testimony that a financial arrangement was made for the tattoos;<sup>67</sup> “not persuaded” that the Facebook message received by HJ after the events was not sent by the accused;<sup>68</sup> “not satisfied beyond a reasonable doubt” that the accused saw a permission slip;<sup>69</sup> and “not persuaded” by the fiancée’s testimony that he had not negotiated to exchange tattoos for sex.<sup>70</sup> The Court of Appeal acknowledged that the occasional mistake on burden of proof has to be seen in the context of the correct instructions earlier in the judge’s reasons, but decided that it had to allow the appeal because the facts to which these mistakes related were central to the accused’s defence and contrary to the requirements of *R v W(D)*<sup>71</sup> regarding burden of proof and credibility. The Court of Appeal could have left the matter there and allowed a new trial on burden of proof errors alone, but it decided to go on and clarify the impact of *Morrison* on the reasonable steps provision in s.150.1(4).<sup>72</sup>

## B. The “All Reasonable Steps” Issue

The trial judge in *Carbone*, prior to the decision in *Morrison*, convicted the accused because the Crown had proven beyond a reasonable doubt that

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<sup>65</sup> *Ibid* at paras 25–26.

<sup>66</sup> See *ibid* at para 29.

<sup>67</sup> *Ibid* at para 31.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*.

<sup>71</sup> [1991] 1 SCR 742, [1991] SCJ No 26.

<sup>72</sup> The Court rejected the arguments related to a s. 11(b) trial within a reasonable time and clarified that the crime of invitation to sexual touching does not require that the accused initiated the communication or activity, but rather that he said something that amounted to an invitation. The Court agreed that the trial judge wrongly implied that the Crown had to prove that oral sex happened, but that this error did not disadvantage the accused. See *Carbone*, *supra* note 5 at paras 58, 61–63.

the accused had not taken all reasonable steps to inquire into the complainant's age as was the law at that time. This has been the approach taken by appellate courts across the country for years,<sup>73</sup> and the Supreme Court of Canada had confirmed this approach in *R v George*.<sup>74</sup> Once *Morrison* was released, however, the defence in *Carbone* argued on appeal for the first time that the reasoning in *Morrison* should be extended to invitation to sexual touching such that, even where the Crown has proven beyond a reasonable doubt that the accused failed to take "all reasonable steps" to ascertain the age of the complainant, the Crown must go on to prove that the accused knew or was wilfully blind to the complainant's young age.

The Court of Appeal agreed with the Crown that the context of Internet luring could be distinguished from invitation to sexual touching. The statutory provisions dealing with Internet luring must be able to address the unique challenges of dealing with those who use the Internet to exploit children and to facilitate police intervention before further sexual offences have taken place. The luring legislation allows police to intervene not only based on an underage complainant but also based on the accused's belief about the complainant's age, thus allowing for sting operations to identify predators before they lure actual children. Because there is no harm to an actual child in the sting context, a "stringent subjective standard" of *mens rea* is required.<sup>75</sup> The mistake of age defence and the corresponding "all reasonable steps" provision for sexual offences against actual children require a less stringent *mens rea* requirement. The Court of Appeal did acknowledge that the reasonable steps provision has no role left to play in the context of Internet luring,<sup>76</sup> but it explicitly held that this analysis could not be extended to reasonable steps provisions for other offences against actual children.

However, the Court of Appeal accomplished exactly the same result by returning to the *Morrison* majority's brief discussion of the decision in *George* and concluding that the Crown now has a new additional *mens rea* requirement before an accused can be convicted. The unanimous Supreme Court of Canada judgment in *George*<sup>77</sup> had confirmed that the reasonable

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<sup>73</sup> See e.g. *Duran*, *supra* note 16 at para 51; *Saliba* (2013), *supra* note 16 at paras 26–28; *Tannas*, *supra* note 16 at paras 21–24; *Nguyen*, *supra* note 16 at para 4.

<sup>74</sup> See *George* (SCC), *supra* note 15 at para 8.

<sup>75</sup> *Carbone*, *supra* note 5 at para 100.

<sup>76</sup> See *ibid* at para 91.

<sup>77</sup> *Supra* note 15.

steps requirement modifies the *mens rea* requirement for the crime of sexual interference. In other words, an honest belief that the complainant was above the age of consent is only a defence where the accused has taken all reasonable steps. Once the Crown disproves beyond a reasonable doubt that the accused took all reasonable steps, there is no room for an accused to assert an honest mistaken belief in age.

Ms. George was acquitted of sexual interference at trial on the basis that a trial judge had a reasonable doubt that she had taken “all reasonable steps” to ascertain age before having sex with an underage male friend of her son.<sup>78</sup> The Court of Appeal overturned that acquittal on the basis that information the accused gained while having sex with the complainant could not constitute reasonable steps and that the trial judge had drawn improper inferences about the appearance of the complainant.<sup>79</sup> The Supreme Court of Canada reinstated the acquittal on the basis that the Court of Appeal should not have interfered with the trial judge’s assessment of the evidence. Nonetheless, the Supreme Court of Canada confirmed the widely held understanding of the reasonable steps provisions requiring the Crown either to negate the mistaken belief or to negate the all reasonable steps requirement:

[T]o convict an accused person who demonstrates an “air of reality” to the mistake of age defence, the Crown must prove, beyond a reasonable doubt, either that the accused person (1) did not honestly believe the complainant was at least 16 (the subjective element); or (2) did not take “all reasonable steps” to ascertain the complainant’s age (the objective element) [...].<sup>80</sup>

[and]

It is a criminal offence to sexually touch a child who is 14 years of age or more but younger than 16 when you are five or more years their senior, even if you honestly believe they are older than 16, unless you have taken “all reasonable steps” to ascertain their age; nothing more is required [...].<sup>81</sup>

*George* is unequivocal on how the “all reasonable steps” provision limits the defence of mistaken belief. However, there were two paragraphs about *George* in *Morrison* – which were completely unnecessary for a decision on Internet luring in the sting context – that bring this finding in *George* into doubt. The majority in *Morrison* effectively rewrote *George* by saying that

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<sup>78</sup> See *R v George*, 2016 SKCA 155 at para 19.

<sup>79</sup> See *ibid* at paras 41–46, cited in *George* (SCC), *supra* note 15 at para 12.

<sup>80</sup> *George* (SCC), *supra* note 15 at para 8 [footnotes omitted; emphasis added].

<sup>81</sup> *Ibid* at para 26 [footnotes omitted].

even where the Crown has disproven all reasonable steps to ascertain age beyond a reasonable doubt, a conviction is not inevitable because the Crown would still have to prove George knew the complainant's age. Here is that confusing passage from *Morrison* in full:

Given that the complainant was legally incapable of consenting, Ms. George's sole defence was that she believed, albeit mistakenly, that the 14-year-old complainant was at least 16 years old. In those circumstances, if the trier of fact were to find or have a reasonable doubt that Ms. George honestly believed the complainant was at least 16, she would be entitled to an acquittal. Put differently, if the Crown hoped to obtain a conviction, it had to overcome her defence of mistaken belief.

Against this backdrop, the passage in question at para. 8 of *George* explains that there 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.<sup>82</sup>

With the emphasized part of this passage, the *Morrison* majority risked undermining all of the *Criminal Code*'s reasonable steps provisions regarding age. It did not indicate that it was overruling the unanimous decision in *George* or even that *George* had misstated the law. Ought we to take this passage as the *Morrison* majority implicitly undoing years of appellate jurisprudence, including its own clear language in *George*, on reasonable steps provisions in the context of mistaken beliefs in age? This is precisely what the Court of Appeal for Ontario concluded in *Carbone*, holding that the Crown disproving all reasonable steps is no longer sufficient to negate a mistaken belief in age defence:

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 believe the complainant was underage.

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<sup>82</sup> *Morrison* (SCC), *supra* note 6 at paras 87–88 [emphasis added].

The requisite proof is not provided by the Crown's negation of the defence created by s. 150.1(4).<sup>83</sup>

Unlike the passage quoted from *Morrison* which speaks only of actual belief, the Court in *Carbone* did concede that recklessness about the complainant's age will be a sufficient mental state under these offences. But the fact remains that the requirement that the accused take "all reasonable steps" has no impact on the verdict. If the accused raises an air of reality that he was mistaken about the complainant's age and that he took all reasonable steps, the Crown must prove beyond a reasonable doubt that he did not take all reasonable steps, but doing so does not result in conviction. The Crown must go on and prove a subjective fault requirement beyond a reasonable doubt. Rather than a path to conviction, the reasonable steps provision is transformed into one more hurdle for the Crown. If the Crown is unable to disprove reasonable steps beyond a reasonable doubt, the accused is acquitted. If the Crown is able to disprove reasonable steps beyond a reasonable doubt, the inquiry moves on to did the accused know, or was he wilfully blind or reckless as to the age of the complainant before obtaining a conviction.

The Court of Appeal did recognize that it had opened the door to acquittals for those who never bother to think about age but go ahead and engage in sexual activity with a child regardless. What follows looks a bit like a new description of recklessness, referred to as "reckless indifference", to deal with those who simply do not think about age. The Court described reckless indifference as follows:

An accused who never turns his mind to the complainant's age can properly be described as reckless with respect to the complainant's age in most circumstances. Indifference to the age of the person targeted by sexual activity is a choice by an accused to treat the complainant's age as irrelevant to his decision to engage in the sexual activity. In most circumstances, the age of the young person will have obvious relevance, bearing in mind the clear responsibility which the law places upon adults who choose to engage in sexual activity with young persons: [...]

Reckless indifference describes a subjective state of mind. It reflects a choice to treat age as irrelevant and to assume the risk associated with that choice. While this may describe a relatively low level of recklessness, there is nothing in the nature of the conduct engaged in which would warrant any level of risk taking or preclude the imposition of criminal liability based on a reckless indifference to the complainant's age: [...]<sup>84</sup>

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<sup>83</sup> *Carbone*, *supra* note 5 at para 120.

<sup>84</sup> *Ibid* at paras 126-27 [citations omitted; emphasis added].

However, even this definition of “reckless indifference” requires a choice to treat age as irrelevant and a subjective awareness of the risk. The person who simply does not think about age is not reckless. The Court also acknowledged that usually the failure to take reasonable steps will make it difficult for the accused to claim that he believed the complainant was of the required age. There will be “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.”<sup>85</sup> The Court acknowledged that it had complicated the job of trial judges and juries for these crimes. It set out the following steps to follow. If these instructions appear complicated, imagine explaining steps two and three to a jury:

Step 1: The trial judge will first determine whether there is an air of reality to the s. 150.1(4) defence, that is, is there a basis in the evidence to support the claim the accused believed the complainant was the required age and took all reasonable steps to determine the complainant’s age.

Step 2: If the answer to step 1 is no, the s. 150.1(4) defence is not in play, and any claim the accused believed the complainant was the required age is removed from the evidentiary mix. If the answer at step 1 is yes, the trial judge will decide whether the Crown has negated the defence by proving beyond a reasonable doubt, either that the accused did not believe the complainant was the required age, or did not take all reasonable steps to determine her age. If the Crown fails to negate the defence, the accused will be acquitted. If the Crown negates the defence, the judge will go on to step 3.

Step 3: The trial judge will consider, having determined there is no basis for the claim the accused believed the complainant was the required age, whether the Crown has proved the accused believed (or was wilfully blind) the complainant was underage, or was reckless as to her underage status. If the answer is yes, the trial judge will convict. If the answer is no, the trial judge will acquit.<sup>86</sup>

The first step is clear and relates to the judge’s role in determining whether the defence has met the air of reality threshold to point to some evidence that the accused was mistaken about the complainant’s age and that he took all reasonable steps to ascertain it. The second step addresses whether the Crown is able to disprove beyond a reasonable doubt either the mistaken belief or the “all reasonable steps”. Where things get complicated is step 3. Even if the Crown proves beyond a reasonable doubt either that

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<sup>85</sup> *Ibid* at para 130.

<sup>86</sup> *Ibid* at para 129.

the accused was not mistaken or that he did not take all reasonable steps to ascertain age, the Crown in Ontario now has an additional burden to prove that the accused knew that the complainant was under the age of consent or was wilfully blind or reckless with respect to that fact. There is no mention of “reckless indifference” in this third step, thus suggesting that it is simply synonymous with recklessness and that the Court was not attempting to develop some new modified form of recklessness.

The Court was explicit that it is the two paragraphs from *Morrison* about *George*, unnecessary for the decision in *Morrison*, that have undermined constitutionally valid criminal legislation:

The treatment of *George* by the majority in *Morrison* makes it clear that the Crown cannot prove the requisite *mens rea* for offences set out in s. 150.1(4) by disproving the defence created by that section. To convict, the Crown must prove the accused had the requisite state of mind with respect to the complainant’s underage status.<sup>87</sup>

Again, the Court reiterated that there will be “few situations”<sup>88</sup> where the accused will be able to raise such a reasonable doubt about his knowledge/recklessness that the girl was underage.

While one can imagine circumstances in which the failure to advert to the age of the complainant should not be characterized as a decision to treat the age of the complainant as irrelevant and take the risk, those circumstances will seldom occur in the real world. For practical purposes, those rare circumstances, in which the failure to turn one’s mind to the age of the complainant does not reflect the decision to take a risk about the complainant’s age, will be the same rare circumstances in which the reasonable steps inquiry in s. 150.1(4) will be satisfied even though the accused took no active steps to determine the complainant’s age.<sup>89</sup>

As will be discussed in more detail below, the Court acknowledged in this passage that, unsurprisingly, the cases where this new additional *mens rea* requirement will be most likely to lead to acquittal will be those where courts have already done the most to undermine the “all reasonable steps” requirement in the past, holding that the accused need do nothing to satisfy taking “all reasonable steps”.<sup>90</sup> In other words, acquittals will be most likely the accused has made assumptions about a child’s age based on what she looks like, how she behaves, or the circumstances in which he finds her without having done anything to ascertain age.

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<sup>87</sup> *Ibid* at para 128.

<sup>88</sup> *Ibid* at para 130.

<sup>89</sup> *Ibid* at para 131.

<sup>90</sup> For sources and further discussion of this topic, see n 104 and accompanying text.

### C. Analysis

*Carbone* effectively renders the “all reasonable steps” provision in s. 150.1(4) irrelevant to whether an accused is convicted in Ontario. Instead, it makes the “all reasonable steps” requirement an additional hurdle for the Crown to negate to avoid an acquittal, even though doing so will not lead to conviction. An accused can no longer be convicted on the basis that he failed to take all reasonable steps to ascertain the age of the complainant. Instead, for the accused who did nothing to ascertain a child’s age, the Crown must prove at least recklessness with respect to the fact that the complainant was underage.

While the approach in *Carbone* could be said to logically flow from the obscure passage about *George* in *Morrison*, it was not the only possible interpretation. The Court of Appeal for British Columbia took a different path in *Angel*<sup>91</sup> when it declined to apply *Morrison* to the crime of sexual interference against an actual child. The Court in *Angel* correctly highlighted the fact that the majority in *Morrison* limited its judgment to the context of a police sting operation where an actual belief about age is required by the legislation. Sexual interference, by contrast, always involves an actual child, and knowledge is not required:

In the context of a police sting operation where there is no child who is under the legal age, as in *Morrison*, the offence depends on the accused’s belief that he is communicating with an underage person. In contrast, the offence [sexual interference] in s. 151 does not engage the accused’s belief as to the complainant’s age as an element of the offence in the absence of the mistake of age defence being raised.<sup>92</sup>

The Court in *Angel* differentiated *Morrison* as follows. The problem in *Morrison* was that the elements of the defence of mistake did not line up with the elements of the crime of Internet luring. The defence was founded on the Crown negating an objective test, whereas the offence explicitly required an actual belief. Therefore, disproving the defence was not sufficient to prove the offence. In sexual interference, by contrast, recklessness is sufficient and therefore disproving the defence will inevitably lead to conviction.<sup>93</sup> However, most importantly, the Court in *Angel* acknowledged that the all reasonable steps requirement “imports an

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<sup>91</sup> *Supra* note 16.

<sup>92</sup> *Ibid* at para 31 [emphasis in original].

<sup>93</sup> See *ibid* at para 45.

objective element”<sup>94</sup> into the recklessness analysis for sexual interference. Thus, while the Court of Appeal is equating the “all reasonable steps” test with recklessness, it is recklessness modified by an objective component that is mandated by the all reasonable steps requirement in s. 150.1(4):

The judge was required to consider the all reasonable steps requirement to determine the availability of the defence. By doing so in this context, he was also assessing whether the Crown had satisfied its burden of proving the requisite *mens rea* of the offence – i.e., that the appellant’s subjective belief was not objectively reasonable, and was therefore reckless. Therefore, once the trial judge concluded that the appellant had failed to take all reasonable steps to ascertain the complainant’s age, there was no need to explicitly revisit the essential elements of the offence. At that point, the judge was satisfied that the Crown had met its burden of proving that the mistake of age defence did not apply. At the same time, the culpable fault element for sexual interference was established: the appellant intended to touch the complainant for a sexual purpose and was recklessly indifferent as to his age.<sup>95</sup>

This approach makes more sense where one reads in the requirement that the accused must only take steps in the circumstances known to the accused at the time, which the Court in *Angel* appears to do, because that adds the necessary subjectivity into the test.<sup>96</sup>

The Court in *Angel* made explicit that it was concerned about the possibility of extending *Morrison* beyond the narrow context of the sting operation because it had the potential to undermine decades of sexual assault law reform enacted to prevent acquittals based on unreasonable mistaken beliefs:

More precise reasoning by the Supreme Court of Canada than exists in *Morrison* is required before it can be extended to the interrelationship of the *mens rea* requirement and mistake of age defence, as they pertain specifically to the offence of sexual interference under s. 151 of the *Code*. This is particularly the case where, as noted above, Moldaver J. restricted his analysis to the context of Internet luring where there is no actual underage child [...]<sup>97</sup>

Thus, the Court of Appeal for British Columbia managed to maintain a meaningful role for s. 150.1(4). Once the Crown proves beyond a

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<sup>94</sup> *Ibid* at para 48.

<sup>95</sup> *Ibid* at para 49.

<sup>96</sup> See *ibid* at para 58 (although the Court is not entirely clear on this point). See also *Morrison* (SCC), *supra* note 6 at para 105 (where Justice Moldaver reads this requirement into the reasonable steps provision in s. 172.1(4)); *Thain*, *supra* note 36 at para 37; *Dragos*, *supra* note 16 at paras 32, 41; *Pengelly*, *supra* note 36 at para 9.

<sup>97</sup> *Angel*, *supra* note 16 at para 51 [citations omitted].

reasonable doubt that the accused was not mistaken or did not take all reasonable steps, conviction will follow.

While *Angel* is cited for the principle that recklessness is sufficient *mens rea* for sexual interference,<sup>98</sup> there is no mention in *Carbone* of the different approach to reasonable steps in *Angel*. The objective component mandated by s. 150.1(4) disappears from the analysis. The Supreme Court of Canada has denied leave to appeal in *Angel*,<sup>99</sup> and it is unlikely the Crown will seek leave to appeal in *Carbone*.<sup>100</sup> Regardless, the result is that we are left with an “all reasonable steps” requirement for age in British Columbia but not in Ontario.

The Court of Appeal for Ontario purported to limit its decision by imposing a minimalist interpretation of recklessness, stating that it will often be enough to show that the accused did nothing to ascertain age. But the fact remains that someone who never considers the possibility that he is dealing with a child is entitled to an acquittal. Recklessness is a subjective mental state and an honest belief, however unreasonable, that the complainant is older than 16 is inconsistent with a finding of recklessness unless one reads in the objective component as acknowledged by the Court of Appeal for British Columbia in *Angel*.<sup>101</sup> Recklessness requires a subjective awareness of the risk; wilful blindness requires an actual suspicion that such is the case and the deliberate closing of one’s mind to the possibility because one does not want to know.<sup>102</sup> The Supreme Court of Canada in *R v Zora*<sup>103</sup> has confirmed that recklessness is a subjective standard requiring the accused “[perceive] a substantial and unjustified risk”.<sup>104</sup> Further, despite its efforts, the Court of Appeal cannot bind future trial judges on findings of fact. A trial judge who finds that the accused never thought about age would be correct in rejecting a finding of recklessness.

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<sup>98</sup> See *Carbone*, *supra* note 5 at para 124.

<sup>99</sup> See *Angel*, *supra* note 16, leave to appeal to SCC refused, 2020 CanLII 29401.

<sup>100</sup> As of 1 December 2020, it was not reported on the Supreme Court of Canada website or elsewhere that leave to appeal has been sought by the Crown. Because the trial judge’s errors on burden of proof were so clear in *Carbone*, an appeal on the reasonable steps issue would be unlikely to impact the order for a new trial.

<sup>101</sup> See *R v Sansregret*, [1985] 1 SCR 570 at 584, 1985 CanLII 79 [*Sansregret*] (where the Court makes clear that a finding of recklessness is inconsistent with a finding of honest mistaken belief).

<sup>102</sup> See *ibid.*

<sup>103</sup> 2020 SCC 14.

<sup>104</sup> *Ibid* at para 109.

Parliament has decided that the failure to take “all reasonable steps” to find out how old a child is before engaging in sexual activity is a blameworthy mental state. If one reads in “in the circumstances known to the accused” as the courts have done, this mental state has a clear subjective component, but it also has an objective component mandated by s. 150.1(4) requiring that all steps that are reasonable be taken. This approach differs from the traditional common law understanding of recklessness as to age because it allows for a conviction where an accused has done nothing to inform himself about the complainant’s age, based on his knowledge of the circumstances, or where he has not taken all the steps considered reasonable. Parliament is free to depart from the common law and has done so in s. 150.1(4). Again, no court has found this level of fault to be unconstitutional.<sup>105</sup>

The Court in *Carbone* suggested that the only cases where this new *mens rea* requirement will make a difference are those where courts have already held that the accused need not take any steps in order to satisfy having taken “all reasonable steps.”<sup>106</sup> These cases involve courts disregarding clear Parliamentary language to instead rely on stereotyped beliefs about the sexual availability of the most marginalized girls.<sup>107</sup> Not thinking, or making

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<sup>105</sup> Most of the cases involving *Charter* challenges to this provision focus on s. 150.1(1), which removes the defence of consent where the complainant is under the age of consent. However, many of these cases confirm the constitutionality of s. 150.1 as a whole in the analysis. See e.g. *Osborne*, *supra* note 31; *R v Hann*, 1992 CanLII 7133 (NL CA), 75 CCC (3d) 355; *R v AB*, 2015 ONCA 803. In a rare case where a s. 7 violation was found to be a reasonable limit under s. 1, a Quebec court also upheld s. 150.1. See *Protection de la jeunesse-436*, 1989 CarswellQue 1232 (CQ (Youth Div), [1990] RJQ 1481. However, this case was decided before courts had determined that the reasonable steps requirement did not put a burden of proof on the accused. In *Morrison* (SCC), *supra* note 6 at para 215 Justice Abella makes the following comment about the constitutionality of reasonable steps provisions generally:

I see nothing constitutionally suspect about reasonable steps requirements generally. These requirements are intended to “enhance protections for youth” in the mistake of age context [...] and preclude reliance on stereotypes and assumptions in the consent context [citations omitted].

<sup>106</sup> See *Carbone*, *supra* note 5 at para 130.

<sup>107</sup> See Grant & Benedet, “Mistake of Age”, *supra* note 29 at 24. See e.g. *Mastel* (SKPC), *supra* note 38 at paras 20–30; *Tannas*, *supra* note 16 at para 35; *R v LTP*, *supra* note 38 at para 27; *R v (R)*, *supra* note 16; *Poirier*, *supra* note 16; *Osborne*, *supra* note 31; *Chapman*, *supra* note 16; *TQBN*, *supra* note 16; *Lewis*, *supra* note 16; *R v K (RA)*, [1996] NBJ No 104, 1996 CarswellNB 67; *Coburn*, *supra* note 16; *Chapais*, *supra* note 16; *Minzen*, *supra* note 16; *Wrigley*, *supra* note 16; *DO*, *supra* note 16; *Vasiloff*, *supra* note 16. It is

assumptions about a girl's age based on the size of her breasts;<sup>108</sup> her associating with older people;<sup>109</sup> her jogging<sup>110</sup> or hitchhiking at night;<sup>111</sup> the fact she knew how to perform oral sex<sup>112</sup> or her portrayal as the sexual aggressor;<sup>113</sup> or the fact that she was drinking alcohol, taking drugs, or smoking cigarettes,<sup>114</sup> should never have satisfied taking "all reasonable steps". Such stereotypes tell us nothing about a particular girl's age. They operate disproportionately against girls who are already marginalized through their chaotic family lives,<sup>115</sup> risk-taking behaviours,<sup>116</sup> or previous experience with sex which may well have been abusive because of their young ages.<sup>117</sup> Lacking parental supervision, abusing drugs or alcohol, knowledge of sex, or even breast development are not reliable indicators of being at or above the age of consent, nor are they steps to ascertain age. It is notable that Indigenous girls are disproportionately impacted by sexual assault and by racist stereotypes about their sexual availability that may feed into an accused making the argument that the circumstances removed his statutory obligation to take "all reasonable steps" to ascertain age.<sup>118</sup>

A finding that doing nothing could ever satisfy taking "all reasonable steps" was already a deliberate distortion of Parliament's unequivocal language in s. 150.1(4). But it was a distortion judges could choose to avoid by giving some content to the "all reasonable steps" requirement. The Crown in Ontario now faces a bigger problem in proving beyond a reasonable doubt that the accused made a subjective choice to disregard age

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noteworthy that all of these cases involve girls as complainants and none of the three cases involving boys as complainants had a similar statement.

<sup>108</sup> See e.g. *R v E*, *supra* note 16 at paras 72, 107–08.

<sup>109</sup> See e.g. *Vasiloff*, *supra* note 16 at para 23; *Tannas*, *supra* note 16 at para 33; *Wrigley*, *supra* note 16 at para 18; *TQBN*, *supra* note 16 at para 48.

<sup>110</sup> See e.g. *DO*, *supra* note 16 at para 17.

<sup>111</sup> See e.g. *Chapman*, *supra* note 16 at paras 3, 53.

<sup>112</sup> See e.g. *Mastel* (SKPC), *supra* note 38 at paras 28, 30.

<sup>113</sup> See *DO*, *supra* note 16 at para 17; *Chapman*, *supra* note 16 at para 52.

<sup>114</sup> See e.g. *Tannas*, *supra* note 16 at para 8; *Vasiloff*, *supra* note 16 at para 23; *TQBN*, *supra* note 16 at para 51.

<sup>115</sup> See e.g. *Tannas*, *supra* note 16 at para 6.

<sup>116</sup> See e.g. *Chapman*, *supra* note 16 at paras 3, 5.

<sup>117</sup> See e.g. *Mastel* (SKPC), *supra* note 38 at para 28.

<sup>118</sup> See Tracey Lindberg, Priscilla Campeau & Maria Campbell, "Indigenous Women and Sexual Assault in Canada" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 87. See also Robyn Bourgeois, "Colonial Exploitation: The Canadian State and the Trafficking of Indigenous Women and Girls in Canada" (2015) 62:6 *UCLA L Rev* 1426 at 1442.

where he has done nothing to ascertain it. The Court of Appeal has opened up the likelihood that men who never consider they are having sex with a child, because they have relied on such stereotypes to inform themselves, will now be entitled to an acquittal even where they have failed to take any steps to ascertain that child's age. An honest belief, even if based on stereotypes, racism, or misogyny, is still an honest belief that can undermine a finding of recklessness and entitle a man to an acquittal after *Carbone*, unless the Crown can prove the more onerous standard of wilful blindness.<sup>119</sup> The fact that it will be the most vulnerable girls who are most directly impacted should concern us all. Our society has deeply embedded preconceptions about what is a real sexual assault against a teenage girl, particularly for girls who are mischaracterized as the aggressors in sexual interactions with older men.<sup>120</sup>

#### D. Extending *Carbone* to Mistaken Beliefs in Consent

The reasoning in *Carbone* could also be relied on by defence counsel to argue that the reasonable steps requirement in the consent context for cases involving adult complainants should be undermined in the same way. The Supreme Court of Canada decision in *R v Barton*<sup>121</sup> strongly supports the assertion that where there is no air of reality to the defence of mistaken belief or where the Crown has negated reasonable steps, there can be no defence of mistaken belief in communicated consent for an accused charged with sexual assault against an adult. The *Barton* Court made clear that where no reasonable steps were taken, there is no defence:

Section 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent – no reasonable steps, no defence. It has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time [...]. Notably, however, s. 273.2(b) does not require the accused to take “all” reasonable steps, unlike the analogous restriction on the defence of mistaken belief in legal age imposed under s. 150.1(4) of the *Code*. [...]<sup>122</sup>

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<sup>119</sup> See *Sansregret*, *supra* note 101.

<sup>120</sup> See e.g. *R v E*, *supra* note 16 at para 93.

<sup>121</sup> 2019 SCC 33 [*Barton*].

<sup>122</sup> *Ibid* at para 104 [footnotes and citations omitted; emphasis added]. *Barton* also endorsed Professor Elizabeth Sheehy's statement that the purpose of the reasonable steps provision dealing with consent was to criminalize sexual assault perpetrators whose mistaken belief in consent is based on “self-serving misogynist beliefs.” See Elizabeth A

*Barton*, like *Morrison*, was written by Justice Moldaver and released barely two months after *Morrison*. Yet *Barton* does not even cite to *Morrison* let alone adopt its reasoning. *Barton* should have settled that *Morrison* was not intended to limit the reasonable steps requirement in the context of consent.

However, despite this clear statement in *Barton*, Justice Bennett, writing for the Court Martial Appeal Court of Canada in *R v MacIntyre*,<sup>123</sup> relied on *Morrison* and *Barton* to undermine the reasonable steps requirement in the context of consent. At issue in *MacIntyre* was whether the Crown had to prove that the accused knew the complainant was not consenting, even where there was no air of reality to the assertion that he had taken reasonable steps to ground a defence of mistaken belief. While the *Morrison* Court had gone out of its way to stress the uniqueness of the sting context for Internet luring, Justice Bennett focused on the similarities between sexual assault against an adult and Internet luring in the police sting context and held that:

The real core of... [Justice Moldaver's] reasoning was that substituting a defence for an element of an offence offends the "bedrock principle of criminal law" that the Crown must prove the essential elements of an offence beyond a reasonable doubt.<sup>124</sup>

She went on to hold that the Crown must still prove the *mens rea* for sexual assault even where the accused had failed to raise an air of reality about reasonable steps. To justify this step, Justice Bennett relied largely on statements about the *mens rea* for sexual assault taken from cases where mistaken belief in consent was not at issue.<sup>125</sup> This decision in *MacIntyre* came just one month after *Barton*, and while it does refer to *Barton*, it does so selectively without mentioning the above-cited passage. There is no

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Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 483 at 492. I would argue that the reasonable steps test in the context of age is similarly intended to prevent men from relying on mistaken beliefs in age that are based on self-serving misogynistic beliefs about the sexual availability of children and especially girls.

<sup>123</sup> 2019 CMAC 3 [*MacIntyre*].

<sup>124</sup> *Ibid* at para 54 [citations omitted].

<sup>125</sup> See *R v Handy*, 2002 SCC 56; *R v JA*, 2011 SCC 28; *R v Skedden*, 2013 ONCA 49. Note that the Court in *JA* did discuss the reasonable steps provision but only in the context of attempting to determine legislative intent about advanced consent. The question at issue in *MacIntyre*, *supra* note 123 was not discussed in *JA*.

reference in *MacIntyre* to *R v Gagnon*,<sup>126</sup> where the Supreme Court of Canada unanimously upheld a finding by the Court Martial Appeal Court of Canada that if there is no air of reality to reasonable steps, the defence of mistaken belief in consent cannot go to the trier of fact.<sup>127</sup>

The Supreme Court of Canada denied leave to appeal in *MacIntyre*, and the decision has not yet been relied on by other appellate courts.<sup>128</sup> The clear inconsistency of *MacIntyre* with the unequivocal language in *Barton*, and its failure to cite relevant Supreme Court authority, should give other courts pause before following the decision.

## V. CONCLUSION

The result of *Carbone* is to undermine, at least in Ontario, an important provision enacted by Parliament in 1987 as part of a legislative scheme designed to protect children from sexual contact with adults. The “all reasonable steps” requirement in the context of age plays an important role in preventing especially adult men from being acquitted for having sex with children where they failed to take all reasonable steps to ascertain the child’s age.

Courts are empowered to strike down legislation when it violates the *Charter*. When it does not, supremacy of Parliament is supposed to mean something; legislation should not be effectively interpreted out of existence as the courts have done in *Morrison* for s. 172.1(4) of the *Criminal Code*, in *Carbone* for s. 150.1(4), and in *MacIntyre* for s. 273.2(b). Courts should instead do their best to give effect to Parliament’s intent in enacting legislation to protect children from sexual contact with adults. Parliament has made taking “all reasonable steps” a statutory requirement, and no court has ever held that requiring an accused to raise an air of reality about such

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<sup>126</sup> 2018 SCC 41, aff’g 2018 CMAc 1 [*Gagnon* (SCC)].

<sup>127</sup> The majority of the Court Martial Appeal Court of Canada in *Gagnon* (CMAc), *supra* note 31 at para 28 had stated: “Parliament decided that the honest but mistaken belief defence is only available to the accused if the accused took reasonable steps, under the circumstances, to ascertain the complainant’s consent for each sexual act in the course of their activities.” The Supreme Court of Canada agreed with this statement. Note that the Supreme Court of Canada in its very brief reasons in *Gagnon* (SCC), *supra* note 126 also reaffirmed its decision in *George* (SCC), *supra* note 15.

<sup>128</sup> See *MacIntyre*, *supra* note 123, leave to appeal to SCC refused, 2020 CanLII 229.. As of 12 November 2020, CanLII reports that *MacIntyre* has been cited in two other cases, *R v MF*, 2020 ONSC 5061 at paras 77-85 and *R c Bitemo Kifoueti*, 2020 QCCQ 5773 (on a different issue).

a requirement is unconstitutional. Instead, it has been interpreted out of existence only to be finally laid to rest in Ontario by the Court of Appeal in *Carbone*.<sup>129</sup>

One can only hope that other provincial appellate courts, and the Supreme Court of Canada, will follow the approach of the Court of Appeal for British Columbia in *Angel* which takes the *Morrison* Court at its word and allows the “all reasonable steps” provision to have some role in prosecutions for sexual abuse against children.<sup>130</sup> It is not too much to ask that adults be required to do everything reasonably possible to find out how old a child is before seeking out sexual activity with that child. Nor is it too much to ask that our courts, where there is no issue of constitutionality, respect legislative provisions enacted by Parliament to protect children from sexual violence.

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<sup>129</sup> The decision in *Carbone* came only weeks after the Court of Appeal for Ontario in *R v Sullivan*, 2020 ONCA 333, this time relying on s. 7 of the *Charter*, struck down s. 33.1 of the *Criminal Code*, enacted explicitly to protect the equality rights of women and children to be free of violence from men who are extremely intoxicated. In *Sullivan*, at paras 56-57, the Court found that the *Charter* had no meaningful place to consider the safety and equality of women and children; instead, the security and equality rights of women and children were relegated to “societal interests” only to be considered under s. 1 of the *Charter*. Section 1 has never been used by an appellate court to uphold a violation of s. 7 in the criminal context leaving women and children with no rights even when criminal laws are enacted for their protection.

<sup>130</sup> The Court of Appeal for British Columbia has recently also rejected a challenge to the constitutionality of substituting young age for non-consent in s. 150.1. See *Alfred*, *supra* note 16.