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14 — Notes and Comments

Isabel Grant and Janine Benedet

Notes and Comments

Unreasonable Steps: Trying to Make Sense of R. v. Morrison

1. — Introduction

Children and youth routinely have easy, unsupervised access to the internet through smartphones and tablets. This connectivity increases the danger that adults will sexually exploit them. Adult chat rooms, which may require nothing more than a child checking a box indicating that they are over the age of 18, are a common site for such exploitation. [1] In most cases, this behaviour only comes to light when either a parent becomes aware of the activity, or when an in-person sexual offence against a child is detected and the online communications are discovered in the course of the investigation.

In 2002, Canada introduced the crime of luring children on the internet for the purposes of committing a sexual offence or an abduction offence. [2] The purpose of this provision, according to the Supreme Court in *R. v. Levigne*, is to catch "adults who, generally for illicit sexual purposes, troll the internet to attract and entice vulnerable children and adolescents." [3] As Doherty JA noted in the Ontario Court of Appeal:

> The Internet is a medium in which adults can engage in anonymous, low visibility and repeated contact with potentially vulnerable children. The Internet can be a fertile breeding ground for the grooming and preparation associated with the sexual exploitation of children by adults. [4]

Internet luring is harmful to children in two distinct ways. First, if the child and the adult meet in-person and sexual abuse occurs, this obviously causes grave harm to the child. Second, the online activity is itself harmful. Conversations amounting to luring may include requests for nude photos, discussion of sexual acts, encouragement to consume pornography, and other exploitative interactions that can cause serious psychological and developmental harm to young victims even without actual in-person sexual contact. If the communications are disclosed more broadly and provoke cyberbullying, the trauma is compounded. [5]

The sexual luring of children on the internet is a crime that is believed to be widespread, but the rate of detection and successful prosecution is very low. Because the internet is borderless, luring can take place across jurisdictions, requiring the cooperation of multiple law enforcement agencies. The most recent detailed Canadian data on child luring, published in 2009, confirmed that the number of incidents reported to police was on the rise, but that the clearance rate for these cases was low. Less than half of the complaints resulted in charges against an alleged perpetrator. Ninety percent of those that did proceed involved multiple charges, many of which were additional sexual offences. [6] More recent statistics indicate that internet luring is the second most commonly reported sexual offence against children and that the number of reported incidents has continued to rise between

2009 to 2017.[7] The Department of Justice reports that the increase in sexual crimes against children in recent years is largely attributable to the increase in internet luring.[8]

Because luring is a crime that is usually committed in secret and is difficult to detect, police use sting operations where a police officer poses as an underage child to engage in conversations with a potential predator. These sting operations raise unique challenges in prosecuting because the Crown must prove that the accused believed something that was clearly not in fact true, *i.e.*, that he was communicating with an underage child. Luring prosecutions are, of course, not limited to police sting operations. Many cases of internet luring involve actual child victims. These crimes may be reported when a family member discovers a child's conversation or after a child has been the victim of a further sexual offence. In a database of prosecutions for sexual offences against adolescent girls over a three-year period by Grant and Benedet, for example, 22 of the 510 persons accused of sexual interference or other sexual crimes were also charged with a total of 65 counts of luring.[9] A majority of these accused were charged with multiple counts of luring against multiple complainants, including one accused charged with luring 14 underage girls.[10]

The Supreme Court of Canada has now addressed the elements of this new crime on three occasions, the most recent of which, the 2019 decision in *R. v. Morrison*, is the subject of this comment.[11] In our view, the majority decision in *Morrison* has the potential to do significant damage to the law of sexual assault and related sexual offences, especially as applied to young victims. This damage might be limited if it can be read narrowly and confined to the unique context of a police sting operation for luring, but the majority reasons are unclear and contradictory on this point. In this comment, we attempt to provide an interpretation of *Morrison* that limits its potential for undermining the application of other sexual offences in the *Criminal Code*. We also suggest legislative responses to *Morrison* that would strengthen the internet luring offence and protect decades of law reform on sexual assault. Sexual offences are, at all stages of the lifespan, profoundly gendered and luring is no exception.[12] Adolescent girls face the highest rates of sexual offences of any age group.[13] The Supreme Court in *Morrison* does not acknowledge that, in limiting the reach of the internet luring offence, and in impeding enforcement, it is also undermining the sex equality rights of girls.[14]

Morrison dealt with three constitutional issues. First, the court considered whether an evidentiary presumption in relation to *mens rea* — enacted to make it easier to convict an accused of internet luring, particularly in cases involving police sting operations — violated the presumption of innocence in s. 11(d) of the *Charter*. Second, the court examined whether the reasonable steps limitation on the defence of mistaken belief in age violated s. 7 of the *Charter* in the context of the internet luring offence. Finally, the constitutionality of a mandatory one-year minimum sentence of imprisonment attached to a conviction for internet luring when prosecuted on indictment was challenged under s. 12 of the *Charter* as cruel and unusual punishment.

Justice Moldaver, writing for the majority, struck down the evidentiary presumption, upheld the reasonable steps provision, and declined to make a decision about the constitutionality of the mandatory minimum. In the result, the conviction was set aside and a new trial ordered. Justice Karakatsanis, concurring, agreed with the majority on the presumption and reasonable steps but would have found that the mandatory minimum violated s. 12. Justice Abella, dissenting, would have struck down not only the evidentiary presumption and the mandatory minimum sentence, but would also have found that the reasonable steps provision violated s. 7 of the *Charter*.

Our greatest concern about the majority's reasons is that, in the course of upholding the reasonable steps provision, they effectively gut it of any content. They do this by holding that, even where the Crown has proven beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain the age of the person with whom he was conversing, the Crown must still prove that the accused knew the person's age. As a result, the reasonable steps requirement, which for over 25 years has limited the defence of mistake of fact in the context of sexual offences, has been jeopardized.

The majority's approach to reasonable steps may have been designed to forestall the result Justice Abella reached in dissent — that the reasonable steps requirement, when used in this context, violates ss. 7 and 11(d) of the *Charter*. Yet the dissent is clearer in its analysis of reasonable steps recognizing that the case law has long treated mistaken belief in age as a defence, and that the reasonable steps requirement places a limit on that defence such that, if the Crown negates reasonable steps beyond a reasonable doubt, the proper verdict is conviction. [15] In this respect, s. 172.1(4) creates an independent path to conviction that incorporates an element of objectivity. Justice Abella, however, would have invalidated the provision because she believed that it unconstitutionally limits the accused's access to the defence of mistake because, in the internet luring context only, it is too difficult to take reasonable steps to determine age. [16]

In this comment, we argue that it is important to limit the scope of the majority judgment in *Morrison* to the situation of internet luring in the context of a police sting operation. A broader interpretation of this decision could undermine decades of sexual assault law reform that has prevented an accused from being acquitted on the basis of a totally unreasonable mistake about consent or age. We argue that the majority would not have intended such a drastic change without being more explicit about doing so. We also contend that, whether the decision is limited to internet luring or extends more broadly to other sexual offences against children, the majority's analysis of the content of reasonable steps to ascertain age risks perpetuating harmful stereotypes about the sexual availability of adolescent girls.

2. — Statutory Provisions

To understand the context of *Morrison*, it is necessary to set out the provisions dealing with internet luring of children. Section 172.1, which was drafted to include both police sting operations and the luring of an actual child, reads as follows:

> **Luring a child**
>
> 172.1 (1) Every person commits an offence who, by a means of telecommunication, communicates with
>
> (a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person under subs. 153(1), s. 155, 163.1, 170, 171 or 279.011 or subs. 279.02(2), 279.03(2), 286.1(2), 286.2(2) or 286.3(2);
>
> (b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under s. 151 or 152, subs. 160(3) or 173(2) or s. 271, 272, 273 or 280 with respect to that person; or
>
> (c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under s. 281 with respect to that person.
>
> **Punishment**
>
> (2) Every person who commits an offence under subs. (1)
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
>
> (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.
>
> **Presumption re age**

> (3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.
>
> **No defence**
>
> (4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

It is only an offence to lure a child online if it is done for the purpose of facilitating a further sexual offence (or abduction). Those offences are set out in the three paragraphs of s. 172.1(1) based on the relevant age of consent for the subsequent offence. Without proof of this further purpose, sexual conversations between an adult and a child are only criminalized if they amount to discrete offences, such as making child pornography or invitation to sexual touching.

The elements of internet luring were set out by the Supreme Court of Canada in *R. v. Legare*:

> (1) an intentional communication by computer; (2) with a person whom the accused knows or believes to be under [the age of consent]; (3) for the specific purpose of facilitating the commission of a specified secondary offence — that is, abduction or one of the sexual offences mentioned . . . with respect to the underage person. [17]

Unfortunately, the court in *Legare* held that it was unnecessary to categorize these elements as *actus reus* or *mens rea*. [18] This meant that, as we discuss below, the court in *Legare* failed to recognize that the elements of luring as defined in s. 172.1 differ depending on whether the case involves a police sting operation or an actual child. In the former situation, the accused has to *believe* that the person with whom he is conversing is underage. According to *Morrison*, this limits the culpable mental states to actual belief or wilful blindness. Where dealing with an actual child, however, the Crown must prove that the child was underage and, as we argue below, the language of the *Code* suggests that recklessness as to age would be sufficient.

3. — The Decisions Below

Douglas Morrison posted an ad on the "Casual Encounters" section of Craigslist, stating "Daddy looking for his little girl — m4w — 45 (Brampton)". [19] Police officer Hilary Hutchinson, posing as a 14-year-old girl named Mia, answered his ad. She testified at trial that she was drawn to this advertisement because it referred to young girls, did not say anything about requiring interlocutors to be of legal age, and had no mention of role-play. [20] "Mia" conversed with Morrison over a period of a few months. She used age-appropriate language for a teenager, including spelling mistakes and slang, and discussed her life at school, her parents, and her grandparents. She only conversed with him during hours before or after normal school hours. She reminded him more than once that she was only 14. Morrison ignored this and failed to follow up with questions to confirm her age, a fact that the trial judge found "at least troublesome". [21] Morrison repeatedly encouraged "Mia" to touch herself sexually, quizzed her on her sexual experience, twice asked for photographs, and encouraged her to skip school and to meet him for sexual activity.

At his trial for internet luring, Morrison testified that he thought he was participating in sexual role-playing with an adult woman because the website through which they met required participants to be 18 years of age or older. He did not raise this argument until trial, saying nothing about this at the time of his arrest or in his video interview. He also described at trial his expectation that people lie about themselves online. He had claimed to be 45 in his advertisement when he was actually 67. [22]

Trial judge, Gage J, found that the presumption as to knowledge of age, where the complainant has represented herself to be a child, infringed s. 11(d) of the *Charter*.[23] The Crown did not attempt to justify the infringement under s. 1. Gage J rejected the s. 7 challenge to the reasonable steps provision because the ultimate burden remained on the Crown to disprove reasonable steps beyond a reasonable doubt. He convicted Morrison on the basis that he failed to take reasonable steps to ascertain Mia's age, although he had a reasonable doubt as to whether the accused had an actual belief that she was 14. Gage J concluded that the nature of the conversations did not support the accused's assertion that Morrison thought he was conversing with an adult. However, Morrison did not fit the stereotype of a typical sexual offender about whom the judge was comfortable drawing a negative inference as to belief: he was 67, had no criminal record, was in a long-term, heterosexual relationship and was a stepfather and step-grandfather.[24]

Gage J found that Morrison was "at least indifferent to the age of the person he was communicating with. Indifference, however, is not the equivalent of belief."[25] He found that Morrison's evidence raised a reasonable doubt about his knowledge of Mia's age, albeit "barely so".[26] He characterized Morrison's mental state as one of negligence or inadvertence to Mia's age. This finding suggests that while it should have crossed Morrison's mind that he could be conversing with a child, it did not — a puzzling conclusion given that Mia repeatedly told him she was 14 years old. Morrison was nonetheless convicted because he had failed to take reasonable steps to ascertain "Mia's" age.

At sentencing, the accused challenged the one-year mandatory minimum sentence attached to a conviction on indictment. The trial judge struck down the sentence as grossly disproportionate under s. 12 and sentenced the accused to 75 days intermittent incarceration (after deducting credit for pre-sentence custody) plus probation.[27]

The accused appealed his conviction and the finding that the reasonable steps provision was constitutional. The Crown cross-appealed the findings on the presumption, the mandatory minimum, and the sentence itself. The Ontario Court of Appeal dismissed the appeals and upheld all the decisions of the trial judge.

The Court of Appeal upheld the finding that the evidentiary presumption violated s. 11(d) because there was no inexorable connection between the representation about age and the accused's belief as to age. Under the s. 1 analysis, the Court of Appeal was hindered by the Crown's failure to present evidence about prosecutions under s. 172.1 or the outcomes of sting operations.[28] In the absence of this evidence, the court found that the minimal impairment test was not satisfied.

The Court of Appeal agreed with the trial judge that the reasonable steps provision did not violate s. 7. The court acknowledged that the reasonable steps provision does introduce an element of objectivity into the crime of luring, just as it does with sexual assault. However, a person who has failed to take reasonable steps to inquire as to age is not morally innocent, nor does the stigma of the offence necessitate purely subjective fault.[29] The Court of Appeal then used its analysis of reasonable steps to justify striking down the mandatory minimum. Because the accused was convicted on the basis of failing to take reasonable steps, the Crown had proven a level of culpability "significantly less blameworthy than the conduct of someone who, for example, deliberately sets about to lure a child."[30]

4. — The Supreme Court of Canada

(a) — The Presumption as to Belief in Age

The evidentiary presumption in s. 172.1(3) states that where the person with whom the accused is communicating represents themselves to be underage, the accused is presumed to believe that representation, in the absence of evidence to the contrary.

This type of evidentiary presumption is not unusual — there are other *Criminal Code* provisions that relieve the Crown of the burden to prove an element of *actus reus* or *mens rea* by substituting proof of a particular fact.[31] The burden to rebut the presumption on the accused is evidentiary in nature; the accused need only point to evidence that, if believed, would be capable of raising a reasonable doubt. The ultimate persuasive burden is on the Crown to prove the accused's belief directly.

In *R. v. Oakes*, the Supreme Court of Canada held that putting a persuasive or legal burden on the accused to disprove an element of the offence on a balance of probabilities violated the presumption of innocence in s. 11(d) because the accused could be convicted despite the existence of a reasonable doubt as to his guilt.[32] In *R. v. Downey*, the Supreme Court extended this reasoning to evidentiary presumptions that could be rebutted through adducing evidence to the contrary.[33] Such presumptions also infringe s. 11(d) unless the presumed fact flowed inexorably from the proven fact.[34] A majority of the court upheld the presumption that those proven to be habitually in the company of prostitutes were living on the avails of prostitution as a reasonable limit under s. 1.[35]

The court's reasoning in *Downey* as to why evidentiary presumptions violate s. 11(d) is not entirely clear. It appears that the court has in mind the situation of an accused who adduces no evidence and where, but for the existence of the presumption, the judge would not have been prepared to convict. In such a case, the presumption forces the court to ignore a reasonable doubt where one is present. Justice Moldaver in *Morrison* explains this conclusion in terms of the principle that "the Crown 'must establish the guilt of the accused beyond a reasonable doubt before the accused must respond.'"[36]

In light of this case law, it is puzzling that the Crown focused its constitutional argument at trial on disputing that s. 11(d) was violated, failing to offer any justification under s. 1. It is hard to see a viable path to resisting a finding that s. 11(d) is violated. We have been unable to find any cases where a mandatory presumption has been upheld on the basis of an inexorable connection between the proven and presumed facts.[37]

The Crown did offer a s. 1 argument before the Supreme Court, but it was rejected. The majority held that the overarching purpose of the luring offence was pressing and substantial, and that the presumption was connected to the broader objective of protecting children. The parties conceded the existence of a rational connection. The court found, however, that the presumption failed the minimal impairment test, and that the deleterious effects of the presumption outweighed its salutary effects. The Crown had not established that the offence could not operate effectively absent the presumption. In the absence of the presumption, the trier of fact could make logical, common sense inferences from the evidence that the accused believed the other person was underage.

In rejecting the inexorable connection argument, Justice Moldaver pointed out that deception is rampant on the internet, and "it may . . . be expected that true personal identities are concealed."[38] Although he acknowledged that the prevalence of deception is not, standing alone, "evidence to the contrary", since that would render the presumption meaningless, it is worth considering what the relevance of this observation is to the luring offence. The fact that representations as to age are unreliable does not mean that where sexualized interactions take place online, one can never know that one is dealing with a child. Put another way, the inherent unreliability of the internet should not be used to shelter child sex abusers where there are direct representations by the other person that they are underage. If an adult deliberately seeks out a child for online sexual encounters, they should not be able to turn around and say that they are innocent because they couldn't be sure they were actually speaking to a child.

The majority (and Justice Abella in dissent) are incorrect to describe internet luring as always inchoate or merely preparatory, as if the only harm is the completed sexual offence. Sexualized conversations with children, which may include encouraging them to watch pornography, descriptions of sexual acts, inviting them to touch themselves or asking to see their nude bodies, are harmful to children. It is not entirely correct to say that the purpose of the luring offence is to "close the cyberspace door before the predator gets to its prey."[39] Once the communications begin, the child has already been preyed upon. Where an undercover

"sting" operation is involved, there is no victim, and so no actual harm, but that is true of many police sting operations. There is nothing unusual about internet luring in that respect.

The s. 1 analysis fails to acknowledge what activities the court is presumably seeking to protect by removing the presumption. The presumption has no application to the situation where an actual child claims to be an adult because there has been no representation that the other person is a child. Instead, the presumption applies to three situations: (i) where an adult pretends to be a child for the purposes of investigating suspected predation (the "sting"); (ii) where an adult pretends to be a child to gain or provide sexual satisfaction from mimicking child sexual abuse (so-called "role-play"); or (iii) where the child accurately identifies themselves as a child. The focus of the Supreme Court in *Morrison* is entirely on the "sting" scenario, but this does not provide a full picture of what the presumption is doing.

Where a child accurately and consistently represents themselves as a child, it is hardly unreasonable to expect the accused to provide some evidence that he believed otherwise. The only possible explanation for continuing such a conversation with a person you believe is an adult posing as a child is the one that Morrison offered at trial, namely desiring to engage in child sexual abuse "role-play." The s. 1 minimum impairment and proportionality analysis should have recognized that such activity is harmful and deserves no constitutional protection. It is part of a category of activities that normalizes the sexual abuse of children and conditions a sexual response to that abuse. [40] A minimal limitation on the presumption of innocence should have been seen as reasonable under s. 1 because the presumption applied to the actual child and role-play scenarios.

(b) — The Reasonable Steps Requirement

The Supreme Court also considered the constitutionality of the reasonable steps provision in s. 172.1(4), which limits the defence of mistaken belief in age. The first "reasonable steps" requirement was added to the *Code* in 1992, to limit the defence of mistaken belief in consent for sexual assault. [41] There are also several reasonable steps provisions in the *Code* dealing with mistakes about age where the complainant is a child. These provisions are divided between those that require the accused to take reasonable steps, [42] and those requiring the accused to take *all* reasonable steps. [43] The reasonable steps provision dealing with consent requires only reasonable steps *in the circumstances known to the accused at the time*. The age provisions do not include this limitation, but it has sometimes been read in by courts. [44] Given the widespread use of these provisions in sexual offences, a constitutional challenge to the reasonable steps requirement has the potential to have a significant impact on the prosecution of these crimes moving forward.

The basis for the s. 7 challenge was that the objective component introduced by the reasonable steps requirement violates the principle of fundamental justice that moral blameworthiness must be proportionate to the stigma and punishment of an offence. [45] The majority upheld the reasonable steps provision under s. 7 of the *Charter*, describing it as "very doubtful" that luring was a special stigma crime requiring subjective fault. [46] In so doing, however, it rendered the provision meaningless — at least in the context of internet luring or, as we argue below, internet luring in the context of a sting operation. The majority analysis of reasonable steps is difficult to untangle. As discussed above, the trial judge had a reasonable doubt about the accused's belief in "Mia's" age but convicted on the basis that Morrison had failed to take reasonable steps. The majority found this to be in error because s. 172.1(4) does not provide "an independent pathway to conviction." [47] This approach is contrary to the understanding of reasonable steps as applied in other sexual offences, and the majority reasons are unclear on how to resolve that apparent contradiction.

Reasonable steps provisions purport to limit the accused's ability to rely on the defence of mistake where he has not made a reasonable effort to ascertain age. In order for the defence to be raised, the accused must adduce evidence that, if believed, would leave a jury with a reasonable doubt as to whether the accused honestly believed the complainant was of legal age and took reasonable steps to ascertain that age. Once that air of reality test has been met, the Crown is required to disprove one or

more elements of the defence beyond a reasonable doubt in order to obtain a conviction (assuming the other elements of the offence have been proven). The majority in *Morrison*, however, requires the Crown to prove beyond a reasonable doubt that there is no mistaken belief even *after* it has negated any possibility of reasonable steps.

It is not clear on this analysis what room is left for the reasonable steps requirement to ever make a difference to the result. While the majority does describe it as an affirmative defence, it does not recognize that by requiring the Crown to negate reasonable steps and *then* independently prove belief, there is no circumstance where the reasonable steps requirement will ever put any limit on the defence:

> Subsection 172.1(4) does not make [the Crown's requirement to prove the accused was not mistaken] any less essential. Rather, in the absence of the presumption under s. 172.1(3), what it does is bar accused persons from raising, as a defence, that they believed the other person was of legal age where they failed to take reasonable steps to ascertain the other person's age. Put differently, it does not provide an independent pathway to conviction; it merely limits a defence. This proposition is made clear by the opening words of subs. (4): "It is not a defence . . . ." To be clear, while the word "defence" can be understood more broadly or more narrowly depending on the context, I am of the view that "defence" here is referring to an *affirmative* defence advanced by the accused as to the accused's belief that would entitle him or her to an acquittal if believed or if it were to leave the trier of fact in a state of reasonable doubt. [48]

What is difficult to understand is when Justice Moldaver *thinks* this defence would ever be raised. 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. [49]

The Supreme Court has long held that a mistake of fact, while effectively a denial of *mens rea*, is best understood as operating as a defence:

> Mistake is a defence, then, where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts. [50]

With the addition of the reasonable steps requirement to the mistake defence, the question became whether the reasonable steps test was part of the air of reality threshold such that mistake could only go to the trier of fact where there was some evidence that the accused took reasonable steps. The Supreme Court of Canada only recently decided this question in *R. c. Gagnon*. [51] The accused in *Gagnon* was acquitted of sexual assault in a military prosecution and the Crown appealed the acquittal to the Court Martial Appeal Court of Canada. [52] The Appeal Court held that there must be an air of reality to the presence of reasonable steps before the defence of mistake can be put to a trier of fact. [53] The majority of the Appeal Court concluded:

> 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. If the accused cannot adduce evidence susceptible to be interpreted as such by the jury, the defence cannot go to the jury. Since the legislator restricted the honest but mistaken belief defence to situations where the accused took reasonable steps in the circumstances known to the accused to ascertain consent, the judge must first determine whether there is an air of reality to those steps. [54]

The Supreme Court of Canada, per Wagner CJC, dismissed Gagnon's appeal from the bench, "substantially for the reasons of the majority of the Court Martial Appeal Court of Canada," holding, "there was no evidence from which a trier of fact could find that the appellant had taken reasonable steps to ascertain that the complainant was consenting." [55]

This approach to sexual assault was confirmed after *Morrison* by the Supreme Court in its reasons in *R. v. Barton*, a case in which the accused argued that he honestly believed that the complainant was consenting to sexual activity that led to her death. [56] The Supreme Court, in majority reasons again authored by Moldaver J, held that the defence of mistaken belief, renamed "honest but mistaken belief in *communicated* consent", was the setting in which the *mens rea* of sexual assault could be disputed. [57] The Supreme Court makes clear in its reasons that the presence of reasonable steps is an element of the defence and, where such steps are not present, the defence will fail: "[s]ection 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent — no reasonable steps, no defence." [58]

Clearly then, for sexual assault and mistakes about consent, failure to take reasonable steps provides an independent pathway to conviction once the Crown has proven the *actus reus* element of non-consent. The Supreme Court of Canada confirmed this finding only months before *Morrison* and reconfirmed it shortly thereafter in *Barton*, without citing *Morrison* or explaining this difference in approach. In fact, the only reference to mistake of age in *Barton* is to emphasize the more onerous requirement that *all* reasonable steps be taken. [59] It makes no sense, then, to extend the "no reasonable steps — no defence" reasoning to adult women but not to girls.

Appellate courts have held that the reasonable steps provision regarding age operates in the same way as the reasonable steps provision dealing with consent. [60] For an accused who is asserting he believed the complainant was above the relevant age of consent, once the Crown proves beyond a reasonable doubt that the complainant was underage, and that the accused failed to take the required reasonable steps to ascertain age, the proper verdict is conviction. There is no further inquiry as to whether the accused was mistaken about the complainant's age precisely because his failure to take steps precludes that defence. The Supreme Court confirmed this as recently as 2017 in *R. v. George*, where it stated:

> [T]hrough statutory intervention, Parliament has imported an objective element into the fault analysis to enhance protection for youth . . . . As a result, to 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). [61]

In *Morrison*, the majority effectively turns the absence of a mistaken belief in age into an element that the Crown must prove beyond a reasonable doubt in *every* case of internet luring, regardless of whether there is an air of reality to the accused having taken reasonable steps, an approach that to us appears inconsistent with both prior and subsequent case law. In light of *Barton*, *Morrison* should not be applied beyond the context of a police sting for internet luring.

The majority's treatment of *George* in particular lacks coherence. Despite the fact that the passage from *George* cited above clearly indicates that the Crown can obtain a conviction by proving that the accused did not take all reasonable steps, Moldaver J retroactively decides that *George* does not actually say what it appears to say:

> 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. [62]

It is difficult to make sense of this passage. First, Justice Moldaver seems to require that the Crown prove *belief* with respect to the complainant's age, despite the fact that recklessness is recognized as sufficient *mens rea* for this element of sexual interference. [63] Second, the Crown proving beyond a reasonable doubt that the accused failed to take all reasonable steps is sufficient to rule out any defence based on the accused's mistake — that is the whole point of the reasonable steps limitations in the *Code*. The defence of mistake is only applicable where those steps have been taken.

The reasonable steps provision in s. 150.1(4) was not at issue in *Morrison*. The majority's casual undermining of *George* and the reasonable steps provision in s. 150.1(4) does not make sense in the context of its multiple attempts to limit the scope of its analysis to police stings for luring. [64] It should not be taken to overrule a long line of jurisprudence without doing so explicitly. It is worth noting that Morrison did not argue before the Supreme Court of Canada that s. 172.1(4) was unconstitutional in the context of luring an actual child, but only in the context of a sting operation. The defence correctly conceded that the constitutionality of reasonable steps provisions had already been effectively decided in *Darrach* and *Hess & Nguyen.* [65] We note also that Abella J explicitly limited her constitutional analysis of reasonable steps to the context of internet luring. [66]

We argue that the only way to make sense of the majority judgment in *Morrison*, without contradicting a long line of cases on other reasonable steps provisions, would be to take the majority at its word that the judgment is limited to internet luring *in the context of a sting operation*. Why might this context be unique? In the context of internet luring of an actual child, the Crown will already have proven that the victim was in fact under the relevant age of consent. Principles of statutory interpretation indicate that recklessness would then be a sufficient *mens rea* with respect to the accused's awareness of the child's age. Recklessness requires proof of an awareness of risk, which should easily be inferred from proof of age, absent defence evidence that would cast doubt on this awareness through a claim of mistake and reasonable steps.

Internet luring when dealing with a sting operation is different because there is no actual child whose young age has been proven. This central component of the *actus reus* is missing and an additional *mens rea* element is substituted — an actual belief on the part of the accused that he was conversing with a child. This belief takes on a central role because, without that belief, the court is of the view that nothing socially harmful has taken place. Thus, only proof of an actual belief (or wilful blindness) that the complainant is underage will suffice and failure to take reasonable steps is not enough for conviction in the absence of that actual belief. The following passage in the majority's reasons only makes sense in the context of the sting operation scenario:

> . . . .[I]f the trier of fact can only conclude from the evidence that the accused was negligent or reckless with regard to the other person's age, the Crown would not have met its burden, and the accused would be entitled to an acquittal. This is because negligence and recklessness are states of mind that do not entail any concrete belief about the other person's age. In short, there is but one pathway to conviction, proof beyond a reasonable doubt that the accused believed the other person was underage. Nothing less will suffice. [67]

Where the offence requires proof of actual belief/knowledge (or wilful blindness) with respect to age as the relevant *mens rea*, a failure to take reasonable steps cannot satisfy that requirement.

That is not true in the case of other sexual offences against actual children or sexual assault against an adult where recklessness as to age or non-consent, as the case may be, is a sufficient *mens rea*. [68] The majority goes on to explicitly hold that recklessness would not be sufficient *mens rea* in the context of a police sting operation, but distinguishes this holding from sexual assault more generally:

> In the context of a police sting where there is no underage person, a showing that the accused was merely reckless, rather than wilfully blind, as to whether the other person was underage will not ground a conviction. In a sense, this distinguishes the child luring offence from the offence of sexual assault. The required *mens rea* for sexual assault is established where the accused is reckless with regard to a lack of consent on the part of the person sexually touched . . . . An accused's awareness that there is a risk that the complainant has not consented to the sexual touching, and the accused's persistence despite this risk, is sufficient to make out the requisite mental element. In the child luring context, however, proving that the accused had a mere awareness of a risk that the other person was underage does not establish that the accused *believed* the person was underage, which is what s. 172.1(1) requires in the context of a police sting where there is no underage person. [69]

In both *Morrison* and the earlier case of *Legare*, there is a lack of acknowledgment that s. 172.1 creates two different ways of committing the same offence through the use of the word "or". The accused must lure either "a person who is, <u>or</u> *who the accused believes is*, under the age [of consent]." These two different ways of committing the crime deal with very different situations. It is only in the context of a sting operation that *belief* becomes the core element of the offence such that *actual belief*, and not simply recklessness, is required. Someone who fails to take reasonable steps, when he knows of circumstances triggering a need to do so, is reckless. Because the courts have read in the requirement that reasonable steps must be assessed in the circumstances known to the accused when dealing with age, there is an element of subjective awareness in the reasonable steps provisions. Thus, there is no reason to extend the logic of the majority to the context of internet luring where an actual child is involved. There is nothing in the wording of s. 172.1 that precludes recklessness in this context, and the lack of clarity about these two distinct ways of committing the offence in *Legare*, and the refusal to distinguish *actus reus* and *mens rea* in that case, has led to this confusion. The majority supports this analysis when it critiques Abella J's dissenting judgment:

> To the extent my colleague Justice Abella concludes otherwise, I respectfully disagree. *In the sting context where there is no actual underage person*, the notion that "s. 172.1(4) allows for a conviction if the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain age (the objective path to liability)" simply does not hold up: Abella J's reasons, at para. 214. If proving the absence of reasonable steps were sufficient to ground a conviction in this context, there would have been no need for the presumption under subs. (3) in the first place. As explained above, absent that presumption, subs. (4) does nothing more than limit a defence. [70]

However, when proof of actual belief is at the core of the offence, the majority has explicitly rendered reasonable steps meaningless:

> Thus, put simply, whether the accused is convicted or acquitted does not hinge on whether the accused took reasonable steps; it hinges on whether the Crown can prove the accused's belief beyond a reasonable doubt. The presence or absence of reasonable steps is not essential for either conviction or acquittal — in short, it is not the "be-all and end-all". [71]

The majority appears to think there is some role for the defence of mistaken belief in age unconnected to the proof of the accused's belief and does not acknowledge that they are one and the same. We urge other courts not to render other reasonable steps provisions meaningless by unnecessarily extending this problematic reasoning to sexual assault and other sexual offences against children. [72]

Morrison makes the internet a more dangerous place for children. What both the dissent and the majority suggest is that a man should always have access to an acquittal based on mistaken belief in age, even if he took no steps to ascertain age and even where the other person describes themselves as underage. We have argued elsewhere, in the context of mistake of age generally, that if the circumstances are such that an accused cannot take any reasonable steps to ascertain age, he should refrain from seeking sexual activity with that person [73] *until such steps are possible*. This is particularly true where the person has represented themselves as a child. The suggestion that a mistaken belief defence must be available to every accused, no matter

how unreasonable his belief, goes well beyond what the Supreme Court has held is required in the context of age. In *Hess & Nguyen*[74] the court held that the *Charter* requires that a defence of due diligence be available to an accused who faces conviction on the basis that the complainant was below the age of consent. Due diligence is, by definition, a defence based on the reasonableness of the accused's conduct.

(c) — The Content of Reasonable Steps

The majority's analysis of what steps might be considered reasonable is also problematic. The majority does acknowledge that reasonable steps must be meaningful and provide information reasonably capable of supporting the accused's belief that the complainant was of legal age. However, reasonable steps need not be active, nor really "steps" at all; the accused need not *do* anything to ascertain age. Reasonable steps can be satisfied by receipt of information: a picture of the complainant that looks of age or conduct or behaviour suggesting she is of legal age. This confirms the position taken in some cases involving children that the accused's observation of the complainant may *obviate the need to take any steps*.[75]

We have argued elsewhere that allowing reasonable steps to be satisfied in the context of age by observations of the complainant's behaviour or appearance, invites the defence to rely on improper stereotypes that disadvantage already marginalized children and, particularly, marginalized girls. These stereotypes, in the context of age, are that a girl who is under age would not smoke, drink, dress "provocatively", stay out late at night, or speak in a manner that suggests she is sexually active.[76] Thus, if a girl is engaging in any of these activities, some courts proceed on the basis that it is reasonable for the accused to assume she is of legal age, or sexually available, and the accused need do *nothing* to confirm this assumption.[77] This approach improperly permits stereotypical thinking to validate both the basis for the belief and the lack of steps to ascertain age. In the context of the internet, this might include a girl who discusses her sexual history or posts photos of herself in sexualized poses. Yet these behaviours tell us nothing about whether a girl is, for example, 16 and of legal age, or 14 and not capable of consenting. Rather, such an approach invites assumptions about particular girls' sexual availability, and effectively excludes from the law's protection girls who have been inappropriately sexualized at a young age, often through sexual assault.

Reliance on such stereotypes has been widely criticized for adult women and should be rejected for girls in the context of age.[78] In *Barton*, the majority specifically cautions that steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps in the context of sexual assault.[79] In *Morrison*, the majority suggests that reliance on a photograph "suggesting the other person is of legal age" would be a reasonable step. This is particularly troubling given that, in the context of the evidentiary presumption, the court rejected the link between making a representation about age and the accused's knowledge because it is widely known that people lie on the internet. Yet at the same time, the court suggests that merely seeing a photograph of a girl who may be trying to look more mature or who may post pictures of someone else can constitute a reasonable step on the part of the accused. There is no conceivable justification for allowing myths and stereotypes to form the basis of mistake or reasonable steps when dealing with girls when we reject them for adult women. In our view, such discriminatory reasoning should be understood as an error of law, as it proceeds on an incorrect legal definition of "reasonable steps".

Justice Abella is correct that reasonable steps are difficult to take in an online context where secrecy and deceit appear to be an accepted norm. Where we disagree, however, is on her conclusion that the inherent dangers of the internet should eliminate, rather than heighten, the responsibility to take such steps.[80] In *Barton*, the Supreme Court suggests that a situation in which the parties are not well known to each other may be an example of a context in which the steps required would be more onerous.[81] A situation in which the parties only know each other through online communication would appear to be just such an example. The concern about overreaching with internet luring is addressed by the additional element of *mens rea* that requires proof that the communications are for the purpose of facilitating a listed sexual offence.

(d) — The Mandatory Minimum Sentence

The majority chose not to decide the constitutionality of the mandatory minimum sentence of one year's imprisonment. Moldaver J explained that the conclusions on s. 12 in the courts below rested on the mistaken understanding that an accused could be convicted on the basis of mere negligence. [82] Since the parties had not had the opportunity to make submissions on the constitutionality of the minimum sentence, on the basis that the offence requires subjective *mens rea*, the issue was best left to the future trial judge. Justice Karakatsanis was puzzled by the majority's disinclination to deal with this question. Not surprisingly given the trend in recent s. 12 jurisprudence, she agreed with the lower courts that the one-year minimum violates s. 12, a conclusion with which Abella J concurred.

This comment is primarily concerned with the elements of the internet luring offence and the reasonable steps requirement, and we will not consider s. 12 in detail. We note, however, that the sentencing of this offence raises similar concerns to those we expressed about the myths and stereotypes deployed in the reasonable steps analysis.

Mandatory minimums were introduced for sexual offences against children in two separate rounds of amendments to the *Code*, in 2005 and 2012. [83] The 2005 amendments set very low minimums and were designed primarily to eliminate the possibility of a conditional sentence order. The 2012 minimums had a different purpose; they were designed to raise the floor of sentences on the belief that sexual offences against children were not being met with sufficiently serious sentences. [84] If these minimums are removed by application of s. 12, this should not be understood to permit the exercise of sentencing discretion based on myths and stereotypes about child sexual abuse, such as the idea that girls who are "willing participants" suffer no harm.

In *Morrison*, we see such myths operating in the trial judge's conclusion that a 67-year-old man in a committed relationship with children and grandchildren would not knowingly engage in online sexual communications with a 14-year-old girl, or seek to meet her for sexual activity. This is based on the myth that sex offenders are deranged, sick, isolated or otherwise "abnormal" men in their day to day lives. This myth affected the trial judge's finding that the Crown had not proved the accused's belief, which in turn also influenced the conclusion that the minimum sentence was too harsh. Courts cannot both claim that internet luring is a very serious offence, but then fail to treat it that way when the facts of the case do not match stereotypical and erroneous views of what a "real" sexual offence is.

We believe that the sentence in this case failed to acknowledge the extensive period of time over which Morrison's communications took place, the fact that they increased in intrusiveness, and culminated in his request to meet "Mia" and have sexual relations. The requirement that the communications be for the purpose of committing another sexual offence means that at least some element of forethought and design is required on the part of the accused before he will be convicted. While the fact that the other person was an adult police officer was relevant to sentence, because it speaks to the harm caused, it does not transform his actions into something fundamentally different from other sexual offences directed at young victims.

5. — Moving Forward from *Morrison*

We have argued that the reasoning in *Morrison* should be limited to internet luring in the context of a police sting operation. The Supreme Court's subsequent decision in *Barton* appears to confirm the conclusion that the law relating to *mens rea* and mistake of fact in the context of sexual assault has not been altered. Looking at these two decisions together leaves us with the impression that the Supreme Court is interpreting sexual offences in the *Criminal Code* in a way that provides much more protection to adult women than to teenage (and younger) girls, at least in the context of internet luring.

Even if this narrower reading of the extent of the holding in *Morrison* is adopted, there are a number of measures that Parliament could take to reduce the risk that this decision will make children even more vulnerable on the internet. The presumption could be re-enacted, making it permissive but requiring a trier of fact to at least consider whether such an inference of belief in age is appropriate in the case before it. Permissive presumptions have been upheld under the *Charter* because a trier of fact is never required to convict in the face of a reasonable doubt. [85]

Parliament should also consider separating out the internet luring offence involving actual children from the offence applicable to sting operations such that it is clear that the actual belief requirement only applies to the latter. Parliament should clarify that internet luring of an actual child, and other sexual offences against children, can be committed through recklessness. Parliament has made this explicit in the *Criminal Code* dealing with sexual assault and mistakes about consent in s. 273.2 (a)(ii) and should enact a similar provision dealing with mistakes about age. Such a provision would be codifying the existing law, not changing it. [86]

If Parliament really wanted to protect children from internet luring, it should go further and recognize there is no social value whatsoever in allowing people to use the internet to pretend to engage in child sexual abuse, and that it is appropriate to prohibit so-called "role-play" in order to protect real children. This would both prevent actual abusers from hiding behind a role-play claim and curb activities that condition a sexual response to child abuse. Parliament could enact a provision that makes it a crime to engage in online communications for the purpose of sexual gratification where a participant in the conversation represents themselves as under the age of consent, or where the dominant theme of such conversations is sexual gratification through the sexual abuse of children. While such offences would inevitably attract s. 2(b) *Charter* challenges, a detailed s. 1 record could be offered.

With respect to reasonable steps provisions generally, Parliament should codify the holding in *Pappajohn* that a claim of honest belief does not go to the jury in every case, for both beliefs in age as well as consent. While it is true that the Crown bears the ultimate burden of proving *mens rea* in the context of consent, the trial proceeds on the basis that mistaken belief is best treated as a defence that can only be raised where there is an air of reality to both the mistake and the reasonable steps taken. Once the Crown has proven beyond a reasonable doubt that the accused did not take the required steps, the *mens rea* has been established.

The decision in *Morrison* is ostensibly focused on the application of the internet luring offence in the context of a police sting operation. While there is no doubt this raises particular considerations in terms of proof, the blameworthy conduct comes from using the internet to seek sexual gratification through the exploitation of a young person. It is unfortunate that the Supreme Court's reasons interpret the offence in such a way that the reasonable steps requirement will never be applied to qualify a claim of mistake of age in this context. This has exactly the same effect as Justice Abella's declaration of unconstitutionality. We have suggested a possible reading of the decision that should preclude its application to other sexual offences with a similar reasonable steps requirement, such as sexual assault and sexual interference. We urge both legislative intervention to moderate the worst impacts of the decision, and a narrow application of it, to avoid effectively invalidating one of the most important and innovative reforms to sexual offences in Canadian criminal law.

Isabel Grant and Janine Benedet [*]

Footnotes

1 For ease of reference, we use the term "child" to refer to anyone under the age of majority. Where we refer specifically to young people in their teenage years, we use the term "adolescents".

2 *Criminal Law Amendment Act, 2001*, S.C. 2002, c. 13, s. 8.

3 *R. v. Levigne*, [2010] 2 S.C.R. 3, 257 C.C.C. (3d) 1, 77 C.R. (6th) 1, 321 D.L.R. (4th) 261, 482 A.R. 49, 30 Alta. L.R. (5th) 85, 403 N.R. 275, 490 W.A.C. 49, 2010 CarswellAlta 1348, 2010 CarswellAlta 1349, EYB 2010-176692, [2010] A.C.S. No. 25, [2010] S.C.J. No. 25, 2010 SCC 25, J.E. 2010-1273, 89 W.C.B. (2d) 279 (S.C.C.) at para. 24 [*Levigne*].

4 *R. v. Alicandro* (2009), 246 C.C.C. (3d) 1, 63 C.R. (6th) 330, 95 O.R. (3d) 173, 245 O.A.C. 357, 2009 CarswellOnt 727, [2009] O.J. No. 571, 2009 ONCA 133, 84 W.C.B. (2d) 150 (Ont. C.A.) at para. 36, leave to appeal refused (2010), 276 O.A.C. 400 (note), 410 N.R. 383 (note), 2010 CarswellOnt 5358, 2010 CarswellOnt 5359 (S.C.C.), cited with approval in *R. v. Legare*, [2009] 3 S.C.R. 551, 249 C.C.C. (3d) 129, 70 C.R. (6th) 1, 313 D.L.R. (4th) 1, [2010] 1 W.W.R. 195, 469 A.R. 168, 14 Alta. L.R. (5th) 1, 396 N.R. 98, 470 W.A.C. 168, 2009 CarswellAlta 1958, 2009 CarswellAlta 1959, [2009] S.C.J. No. 56, 2009 SCC 56, J.E. 2009-2212, 86 W.C.B. (2d) 191 (S.C.C.) at para. 26 [*Legare*].

5 See e.g. "Weeks after posting haunting Youtube video on her years of torment at classmates' hands, 15-year-old B.C. girl commits suicide", *National Post* (October 12, 2012), online: https://nationalpost.com/news/canada/amanda-todd-suicide-2012.

6 Jennifer Loughlin and Andrea Taylor-Butts, "Child Luring Through the Internet" (2009), 29:1 Juristat 1-17, online: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2009001/article/10783-eng.pdf?st=2sCyNKSZ.

7 Mary Allen, "Police-reported crime statistics in Canada, 2017" (2018), 38:1 Juristat 1-50, at 18, online: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54974-eng.pdf?st=A5mGjly5.

8 Department of Justice, Research and Statistics Division, "JustFacts: Sexual Violations against Children and Child Pornography" (2017), online: https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/may03.pdf.

9 See Isabel Grant and Janine Benedet, "Prosecuting Sexual Assault Against Adolescent Girls in Canada" (2019), 31(2) CJWL (forthcoming).

10 *R. c. Girard Lévesque*, 2015 CarswellQue 5178, EYB 2015-252780, 2015 QCCQ 4509, J.E. 2015-1016 (C.Q.). See also *R. v. Groves*, 2015 CarswellOnt 8442, [2015] O.J. No. 2983, 2015 ONSC 2590, 122 W.C.B. (2d) 608 (Ont. S.C.J.), where the accused was charged with 12 counts of internet luring.

11 *R. v. Morrison* (2019), 52 C.R. (7th) 273, 2019 CarswellOnt 3710, 2019 CarswellOnt 3711, 2019 CSC 15, 2019 SCC 15, 152 W.C.B. (2d) 525 (S.C.C.) [*Morrison* SCC]. See also *Levigne*, *supra* note 3 and *Legare*, *supra* note 4. In *R. v. Mills*, 2019 CarswellNfld 161, 2019 CarswellNfld 162, 2019 CSC 22, 2019 SCC 22, 153 W.C.B. (2d) 454 (S.C.C.) the Supreme Court also considered internet learning in the context of s. 8 of the *Charter* and screen-capture technology.

12 Canada, Victims of Crime Research Digest, *The Darker Side of Technology: Reflections from the Field on Responding to Victims' Needs*, by Susan MacDonald, February 2017 (Ottawa: Criminal Justice, 2017).

13 Isabel Grant and 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 628, at 628-29 [Grant and Benedet, Mistake of Age].

14 See also *R. v. Jarvis* (2019), 52 C.R. (7th) 62, 2019 CarswellOnt 1921, 2019 CarswellOnt 1922, [2019] S.C.J. No. 10, 2019 CSC 10, 2019 SCC 10, 152 W.C.B. (2d) 102 (S.C.C.), where LEAF's equality arguments around voyeurism were not acknowledged.

15 The terms "honest belief"and "mistaken belief" are often used interchangeably to describe the mental state underlying a defence of mistake of fact which is asserting the accused did not know that some aspect of the *actus reus* existed such as the complainant's nonconsent or her young age. For internet luring in the context of a sting operation, the accused's belief in age is not mistaken, and so we refer to it as an "honest belief".

16 *Morrison* SCC, *supra* note 11 at paras. 220-223, per Abella J, dissenting.

17 *Legare*, *supra* note 4 at para. 36.

18 *Ibid*., at para. 38.

19 *Morrison* SCC, *supra* note 11 at para. 4.

20 *R. v. Morrison*, 2015 CarswellOnt 16408, [2015] O.J. No. 5620, 2015 ONCJ 599, 125 W.C.B. (2d) 451 (Ont. C.J.) at para. 23, affirmed (2017), 350 C.C.C. (3d) 161, 136 O.R. (3d) 545, 385 C.R.R. (2d) 45, 2017 CarswellOnt 10363, [2017] O.J. No. 3600, 2017 ONCA 582, 140 W.C.B. (2d) 706 (Ont. C.A.), reversed (2019), 52 C.R. (7th) 273, 2019 CarswellOnt 3710, 2019 CarswellOnt 3711, 2019 CSC 15, 2019 SCC 15, 152 W.C.B. (2d) 525 (S.C.C.) [*Morrison* Reasons for Conviction].

21 *Ibid.*

22 *Ibid*., at para. 24.

23 *R. v. Morrison*, 2014 CarswellOnt 17780, [2014] O.J. No. 6057, 2014 ONCJ 673, 118 W.C.B. (2d) 131 (Ont. C.J.).

24 *Morrison* Reasons for Conviction, *supra* note 20 at para. 24.

25 *Ibid*., at para. 26.

26 *Ibid*., at para. 28.

27 *R. v. Morrison* (2017), 350 C.C.C. (3d) 161, 136 O.R. (3d) 545, 385 C.R.R. (2d) 45, 2017 CarswellOnt 10363, [2017] O.J. No. 3600, 2017 ONCA 582, 140 W.C.B. (2d) 706 (Ont. C.A.) at para. 10, reversed (2019), 52 C.R. (7th) 273, 2019 CarswellOnt 3710, 2019 CarswellOnt 3711, 2019 CSC 15, 2019 SCC 15, 152 W.C.B. (2d) 525 (S.C.C.). Sex offender registration and a prohibition on attending places frequented by children were also imposed.

28 *Ibid*., at para. 66.

29 *Ibid*., at para. 101.

30 *Ibid*., at para. 121.

31 See e.g. s. 215(4)(c) (failure to provide necessaries to person under 16); s. 347(3) (criminal interest rate); s. 348(2) (break and enter); s. 445.1(3), (4) (causing suffering to animals). Similar presumptions as to age specifically are found in the offences of making sexual material available to a child (s. 171.1(3)) and agreeing with another person to commit a sexual offence against a child (s. 172.2(3)).

32 *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 26 D.L.R. (4th) 200, 53 O.R. (2d) 719 (note), 14 O.A.C. 335, 65 N.R. 87, 19 C.R.R. 308, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, EYB 1986-67556, [1986] S.C.J. No. 7, J.E. 86-272, 16 W.C.B. 73 (S.C.C.) at pp. 132-133.

33 *R. v. Downey*, [1992] 2 S.C.R. 10, 72 C.C.C. (3d) 1, 13 C.R. (4th) 129, 90 D.L.R. (4th) 449, 125 A.R. 342, 2 Alta. L.R. (3d) 193, 136 N.R. 266, 14 W.A.C. 342, 9 C.R.R. (2d) 1, 1992 CarswellAlta 56, 1992 CarswellAlta 467, EYB 1992-66871, [1992] S.C.J. No. 48, J.E. 92-807, 16 W.C.B. (2d) 163 (S.C.C.) [*Downey* cited to SCR].

34 *Ibid*., at 29-30.

35 *Ibid*., at 39.

36 *Morrison* SCC, *supra* note 11 at para. 56, quoting *R. c. St-Onge Lamoureux*, [2012] 3 S.C.R. 187, 294 C.C.C. (3d) 42, 96 C.R. (6th) 221, 351 D.L.R. (4th) 381, (*sub nom. R. v. St-Onge Lamoureux*) 436 N.R. 199, 37 M.V.R. (6th) 1, 269 C.R.R. (2d) 276, 2012 CarswellQue 10777, 2012 CarswellQue 10778, [2012] S.C.J. No. 57, 2012 SCC 57, 104 W.C.B. (2d) 825 (S.C.C.) at para. 24.

37 Perhaps the closest example is the reasons of Rothstein and Cromwell JJ, dissenting in part, in *R. c. St-Onge Lamoureux*, *ibid*., dealing with presumptions of accuracy relating to blood alcohol levels.

38 *Morrison* SCC, *supra* note 11 at para. 59.

39 *Legare*, *supra* note 4 at para. 25.

40 Other examples of this kind of conditioning include “dress-down” pornography where youthful-looking adult women are presented as children and child sex dolls on which men can perform sexual acts.

41 Section 273.2(b), S.C. 1992, c. 38, s. 1, dealing with all levels of sexual assault against adults. See also s. 153.1(5)(b), dealing with mistaken belief in consent in the context of sexual exploitation of a person with a disability.

42 See s. 171.1(4) (making sexually explicit material available to a child); s. 172.1(4) (luring); s. 172.2(4) (agreeing with another person to commit a sexual offence against a child).

43 Section 150.1(4) requires that the accused take all reasonable steps to ascertain age in the context of sexual interference, invitation to sexual touching, bestiality, indecent exposure and all levels of sexual assault. Section 163.1(5) requires an accused to take all reasonable steps to ascertain age and all reasonable steps to determine whether a representation depicted a person as being a child in the context of child pornography.

44 Grant and Benedet, Mistake of Age, *supra* note 13 at 638, 654; *Morrison* SCC, *supra* note 11 at para. 105.

45 Note that a prior challenge to this in the context of consent was rejected by the Ontario Court of Appeal in *R. v. Darrach* (1998), 122 C.C.C. (3d) 225, (*sub nom. R. v. D. (A.S.)*) 13 C.R. (5th) 283, 38 O.R. (3d) 1, 107 O.A.C. 81, 49 C.R.R. (2d) 189, 1998 CarswellOnt 684, [1998] O.J. No. 397, 37 W.C.B. (2d) 307 (Ont. C.A.), affirmed [2000] 2 S.C.R. 443, 148 C.C.C. (3d) 97, 36 C.R. (5th) 223, 191 D.L.R. (4th) 539, 49 O.R. (3d) 735 (headnote only), 137 O.A.C. 91, 259 N.R. 336, 78 C.R.R. (2d) 53, 2000 CarswellOnt 3321, 2000 CarswellOnt 3322, REJB 2000-20352, [2000] S.C.J. No. 46, 2000 SCC 46, J.E. 2000-1931, 47 W.C.B. (2d) 360 (S.C.C.) [*Darrach*]. The Supreme Court did not consider this issue on appeal: *R. v. Darrach*, [2000] 2 S.C.R. 443, 148 C.C.C. (3d) 97, 36 C.R. (5th) 223, 191 D.L.R. (4th) 539, 49 O.R. (3d) 735 (headnote only), 137 O.A.C. 91, 259 N.R. 336, 78 C.R.R. (2d) 53, 2000 CarswellOnt 3321, 2000 CarswellOnt 3322, REJB 2000-20352, [2000] S.C.J. No. 46, 2000 SCC 46, J.E. 2000-1931, 47 W.C.B. (2d) 360 (S.C.C.). See

R. c. Vaillancourt, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289, 47 D.L.R. (4th) 399, 209 A.P.R. 281, 81 N.R. 115, 68 Nfld. & P.E.I.R. 281, (*sub nom. Vallaincourt v. R.*) 32 C.R.R. 18, 10 Q.A.C. 161, 1987 CarswellQue 18, 1987 CarswellQue 98, [1987] S.C.J. No. 83, J.E. 88-27, 3 W.C.B. (2d) 133 (S.C.C.) at pp. 653-654; *R. v. Martineau*, [1990] 2 S.C.R. 633, 58 C.C.C. (3d) 353, 79 C.R. (3d) 129, [1990] 6 W.W.R. 97, 109 A.R. 321, 76 Alta. L.R. (2d) 1, 112 N.R. 83, 50 C.R.R. 110, 1990 CarswellAlta 143, 1990 CarswellAlta 657, EYB 1990-66938, [1990] S.C.J. No. 84, J.E. 90-1395, 11 W.C.B. (2d) 3 (S.C.C.) at p. 646 for general principles regarding proportionality between moral blameworthiness and the stigma or penalty of an offence.

46 *Morrison* SCC, *supra* note 11 at para. 79.

47 *Ibid*., at paras. 82, 129.

48 *Ibid*., at para. 82.

49 Justice Moldaver's distinction between a defence that the the accused knew the complainant was of *legal age* and the *mens rea* that the accused knew she was *underage*, *supra* note 11 at para. 83, (emphasis original) is a distinction without a difference.

50 *R. v. Pappajohn*, [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481, 14 C.R. (3d) 243 (Eng.), 19 C.R. (3d) 97 (Fr.), 111 D.L.R. (3d) 1, [1980] 4 W.W.R. 387, 32 N.R. 104, 1980 CarswellBC 446, 1980 CarswellBC 546, [1980] A.C.S. No. 51, [1980] S.C.J. No. 51, J.E. 80-573, 4 W.C.B. 422 (S.C.C.) at p. 148 per Dickson J (dissenting in the result, but not on this point). See also the reasons of McIntyre J for the majority at 133-34.

51 *R. c. Gagnon* (2018), 49 C.R. (7th) 263, 427 D.L.R. (4th) 426, 2018 CarswellNat 5739, 2018 CarswellNat 5740, 2018 CSC 41, 2018 SCC 41, 149 W.C.B. (2d) 497 (S.C.C.) [*Gagnon* SCC].

52 *R. c. Gagnon* (2018), 49 C.R. (7th) 266, 427 D.L.R. (4th) 430, 2018 CarswellNat 233, 2018 CarswellNat 234, [2018] C.M.A.J. No. 1, 2018 CACM 1, 2018 CMAC 1, 146 W.C.B. (2d) 103 (Can. Ct. Martial App. Ct.), affirmed (2018), 49 C.R. (7th) 263, 427 D.L.R. (4th) 426, 2018 CarswellNat 5739, 2018 CarswellNat 5740, 2018 CSC 41, 2018 SCC 41, 149 W.C.B. (2d) 497 (S.C.C.).

53 *Ibid*., at para 24 (citing *R v. Barton* (2017), 354 C.C.C. (3d) 245, 38 C.R. (7th) 316, [2018] 1 W.W.R. 450, 55 Alta. L.R. (6th) 1, 386 C.R.R. (2d) 104, 2017 CarswellAlta 1167, [2017] A.J. No. 681, 2017 ABCA 216, 140 W.C.B. (2d) 605 (Alta. C.A.) at para 250, reversed 2019 CarswellAlta 985, 2019 CarswellAlta 986, 2019 CSC 33, 2019 SCC 33, 154 W.C.B. (2d) 472 (S.C.C.)), per Trudel JA for the majority and at para. 59, per Bell CJ, dissenting.

54 *Ibid*., at para. 28.

55 *Gagnon* SCC, *supra* note 51.

56 *R. v. Barton*, 2019 CarswellAlta 985, 2019 CarswellAlta 986, 2019 CSC 33, 2019 SCC 33, 154 W.C.B. (2d) 472 (S.C.C.) [*Barton* SCC].

57 *Ibid*., at paras. 90-92.

58 *Ibid*., at para. 104.

59 *Ibid*.

60 *R. v. Westman* (1995), 106 W.A.C. 285, 65 B.C.A.C. 285, 1995 CarswellBC 1280, [1995] B.C.J. No. 2124, 28 W.C.B. (2d) 440 (B.C. C.A.) [*Westman*]; *R. v. Dragos* (2012), 291 C.C.C. (3d) 350, 95 C.R. (6th) 406, 111 O.R. (3d) 481, 294 O.A.C. 371, 2012 CarswellOnt 9931, [2012] O.J. No. 3790, 2012 ONCA 538, 103 W.C.B. (2d) 711 (Ont. C.A.); *Thompson v. R.*, 2017 CarswellNB 591, 2017 CarswellNB 592, 2017 NBCA 62, 144 W.C.B. (2d) 134 (N.B. C.A.) at para. 22. In *R. v. Nguyen* (2017), 348 C.C.C. (3d) 238, 2017 CarswellSask 189, 2017 SKCA 30, 138 W.C.B. (2d) 509 (Sask. C.A.) at paras. 11-13 [*Nguyen*] the court held that the recklessness limit on mistakes in the context of consent also applies in the context of age.

61 *R. v. George*, [2017] 1 S.C.R. 1021, 349 C.C.C. (3d) 371, 39 C.R. (7th) 1, 413 D.L.R. (4th) 191, 2017 CarswellSask 328, 2017 CarswellSask 329, [2017] S.C.J. No. 100, 2017 CSC 38, 2017 SCC 38, 138 W.C.B. (2d) 634 (S.C.C.) at para. 8 [citations omitted, emphasis added].

62 *Morrison* SCC, *supra* note 11 at para. 88 [emphasis added].

63 *Westman*, *supra* note 60 at para. 18; *Nguyen*, *supra* note 60 at para. 14; *R. v. Kim* (2004), 319 W.A.C. 6, 195 B.C.A.C. 6, 2004 CarswellBC 258, [2004] B.C.J. No. 244, 2004 BCCA 57, 60 W.C.B. (2d) 293 (B.C. C.A.), leave to appeal refused (2004), 331 N.R. 195 (note), 348 W.A.C. 318 (note), 210 B.C.A.C. 318 (note), 2004 CarswellBC 1298, 2004 CarswellBC 1299 (S.C.C.) [*Kim*].

64 For example, paras. 55, 84, 85, 101.

65 *Morrison* SCC, *supra* note 11, Factum of the Respondent/Appellant on Cross-Appeal, File No. 37687, online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37687/FM020_Respondent_Douglas-Morrison.pdf at para 50, citing *R. v. Darrach*, *supra* note 44

and *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906, 59 C.C.C. (3d) 161, 79 C.R. (3d) 332, (*sub nom. R. v. Hess*) [1990] 6 W.W.R. 289, (*sub nom. R. v. Boyle*) 46 O.A.C. 13, 119 N.R. 353, 3 W.A.C. 1, 50 C.R.R. 71, 73 Man. R. (2d) 1, 1990 CarswellMan 223, 1990 CarswellMan 437, EYB 1990-67205, [1990] S.C.J. No. 91, J.E. 90-1424, 11 W.C.B. (2d) 199 (S.C.C.) [*Hess & Nguyen*].

66 *Morrison* SCC, *supra* note 11 at para. 215. Justice Abella's reasoning would apply to all child luring offences.

67 *Ibid*., at para. 83.

68 For offences against children see *Westman*, *supra* note 58; *Kim*, *supra* note 63; *Nguyen*, *supra* note 60. For adult complainants, see s. 273.2 (a)(ii). See also Lucinda Vandervort, "'Too Young to Sell Me Sex?!' Mens Rea, Mistake of Fact, Reckless Exploitation, and the Underage Sex Worker" (2012), 58:3 Crim LQ 355, at 356: "It is now understood that reckless and wilfully blind mistakes of fact are not 'honest' mistakes and do not negative *mens rea* in general intent offences" [Vandervort].

69 *Morrison* SCC, *supra* note 11 at para. 101 [citations omitted].

70 *Ibid*., at para. 84 [emphasis added].

71 *Ibid*., at para. 126.

72 Unfortunately, one subsequent decision from the military appeals court has extended the analysis in *Morrison* to a case involving the sexual assault of an adult woman, heightening our concern that the decision could be interpreted in a way that effectively invalidates the reasonable steps requirement for all sexual offences to which it applies: *R. v. MacIntyre*, 2019 CMAC 3, 2019 CarswellNat 3026, 2019 CarswellNat 3027 (Can. Ct. Martial App. Ct.).

73 Grant and Benedet, Mistake of Age, *supra* note 13 at 658-62.

74 *Hess & Nguyen*, *supra* note 65. In this case, the court struck down the former s. 146 which made it an offence to have sex with a person under the age of consent, whether or not the accused knew that the complainant was underage.

75 *R. v. Tannas* (2015), 324 C.C.C. (3d) 93, 21 C.R. (7th) 166, [2015] 8 W.W.R. 701, 639 W.A.C. 161, 460 Sask. R. 161, 2015 CarswellSask 328, [2015] S.J. No. 284, 2015 SKCA 61, 123 W.C.B. (2d) 402 (Sask. C.A.) [*Tannas*]; *R. v. P. (L.T.)* (1997), 113 C.C.C. (3d) 42, 142 W.A.C. 20, 86 B.C.A.C. 20, 1997 CarswellBC 892, [1997] B.C.J. No. 24, 33 W.C.B. (2d) 292 (B.C. C.A.); *R. v. Mastel* (2010), 2010 CarswellSask 316, 2010 SKPC 66, 88 W.C.B. (2d) 399 (Sask. Prov. Ct.), reversed (2011), 268 C.C.C. (3d) 224, 84 C.R. (6th) 405, 506 W.A.C. 193, 366 Sask. R. 193, 2011 CarswellSask 89, [2011] S.J. No. 93, 2011 SKCA 16, 93 W.C.B. (2d) 749 (Sask. C.A.); *R. v. R. (R.)*, 2014 CarswellOnt 2524, [2014] O.J. No. 959, 2014 ONCJ 96, 112 W.C.B. (2d) 302 (Ont. C.J.).

76 Grant and Benedet, Mistake of Age, *supra* note 13 at 650-58.

77 *Tannas*, *supra* note 75 at para. 27.

78 Grant and Benedet, Mistake of Age, *supra* note 14. In the adult context see Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2011), 22:2 CJWL 397; Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016), 94:1 Can Bar Rev 45.

79 *Barton* SCC, *supra* note 56 at para. 107.

80 In the words of Lucinda Vandervort in the context of child prostitution, "When you do not KNOW that the other party is NOT underage, DESIST.": Vandervort, *supra* note 68 at 361.

81 *Barton* SCC, *supra* note 56 at para. 108.

82 *Morrison* SCC, *supra* note 11 at para. 145.

83 See *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32; *Safe Streets and Communities Act*, S.C. 2012, c. 1.

84 Janine Benedet, "Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences" (2019), 44:2 Queen's LJ 284, at 290.

85 See e.g. *R. v. Russell* (1983), 4 C.C.C. (3d) 460, 32 C.R. (3d) 307, 147 D.L.R. (3d) 569, 117 A.P.R. 701, 56 N.S.R. (2d) 701, 5 C.R.R. 319, 1983 CarswellNS 26, 9 W.C.B. 247 (N.S. C.A.), upholding the doctrine of recent possession under s. 11(d) of the *Charter*. The doctrine was also considered by the Supreme Court in *R. v. Kowlyk*, [1988] 2 S.C.R. 59, 43 C.C.C. (3d) 1, 65 C.R. (3d) 97, [1988] 6 W.W.R. 607, 86 N.R. 195, 55 Man. R. (2d) 1, 1988 CarswellMan 162, 1988 CarswellMan 259, EYB 1988-67145, [1988] A.C.S. No. 66, [1988] S.C.J. No. 66, J.E. 88-1104, 5 W.C.B. (2d) 17 (S.C.C.), although it was not challenged under s. 11(d) in that case. See also *Downey*, *supra* note 33 at 29.

86 *Nguyen*, *supra* note 60.

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