Court File No. 42030

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JORDAN BILINSKI

Appellant
(Respondent)

-and-

HIS MAJESTY THE KING

Respondent
(Appellant)

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF ONTARIO
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)
CRIMINAL TRIAL LAWYERS' ASSOCIATION
DIRECTOR OF PUBLIC PROSECUTIONS
VANCOUVER RAPE RELIEF SOCIETY
WOMEN'S LEGAL EDUCATION AND ACTION FUND

Interveners

FACTUM OF THE INTERVENER VANCOUVER RAPE RELIEF SOCIETY

(Pursuant to Rules 42 of the *Rules of the Supreme Court of Canada*)

JANINE BENEDET, K.C.
ISABEL GRANT

c/o Peter A. Allard School of Law
University of British Columbia
1822 East Mall
Vancouver BC V6T 1Z1
Tel: (604) 822-0637
Email: benedet@allard.ubc.ca

Counsel for the Intervener
Vancouver Rape Relief Society

ORIGINAL TO: **THE REGISTRAR**

COPIES TO:

YOAV NIV
BARRISTER & SOLICITOR
Suite 430, 600 6 Ave SW
Calgary AB T2P 0S5

Tel: (587) 968-6721
Email: yoav@yoavniv.ca

Counsel for the Appellant, Jordan Bilinski

MOIRA S. DILLON
SUPREME LAW GROUP
440 Laurier Ave. West, Suite 200
Ottawa, ON K1R 7X6

Tel: (613) 691-1224
Email: mdillon@supremelawgroup.ca

Agent for Counsel for the Appellant

ANDREW BARG | AURÉLIE BÉLAND
APPEALS AND SPECIALIZED PROSECUTIONS
300, 332 – 6th Avenue SW
Calgary, AB T2P 0B2

Tel: (403) 297-8477
Fax: (403) 355-4518
Email: andrew.barg@gov.ab.ca

Counsel for the Respondent, His Majesty the King

LÉA DESJARDINS
GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3

Tel: (613) 786-0211
Email: lea.desjardins@gowlingwlg.com

Agent for Counsel for the Respondent

MILA SHAH | CRYSTAL TOMUSIAK
CRIMINAL APPEALS BRITISH COLUMBIA PROSECUTION SERVICE
600 – 865 Hornby Street
Vancouver, BC V6Z 2G3

Tel: (263) 888-6248
Fax: (604) 660-1133
Email: mila.shah@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia

MATTHEW ESTABROOKS
GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Tel: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Agent for Counsel for the Intervener

LAURA MATALAS | CURTIS STEEVES
PRINGLE LAW
300 - 10150 100 St NW
Edmonton, AB T5J 0N8

Tel: (780) 424-8866
Fax: (780) 666-7398

KRISTIN WESLOSKY
PRINGLE LAW
300 - 10150 100 St NW
Edmonton, AB T5J 0N8

Tel: 780-424-8866
Fax: 780-666-7398

Email: lmatalas@pringlelaw.ca

Counsel for the Intervener, Criminal Trial Lawyers' Association

Email: kweslosky@pringlelaw.ca

Agent for Counsel for the Intervener

LAUREN WHYTE | BLAIR MACPHERSON
PUBLIC PROSECUTION SERVICE CANADA
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

Tel: (867) 333-9279
Email: Lauren.Whyte@ppsc-sppc.gc.ca

Counsel for the Intervener, Director of Public Prosecutions

ÉRIC MARCOUX
PUBLIC PROSECUTION SERVICE OF CANADA
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

Tel: (867) 336-0762
Fax: (613) 941-7865
Email: Eric.Marcoux@ppsc-sppc.gc.ca

Agent for Counsel for the Intervener

NEHA CHUGH | REAKASH WALTERS
CHUGH LAW PROFESSIONAL CORPORATION
28 First Street West
Cornwall, ON K6J 1B9

Tel: (613) 938-0000
Fax: (613) 938-8556
Email: neha@chughlaw.ca

Counsel for the Intervener, Women's Legal Education and Action Fund

MARK C. HALFYARD | HEATHER GUNTER
DANIEL BROWN LAW LLP
400-103 Church Street
Toronto, ON M5C 2G3

Tel: (416) 297-7200 Ext: 102
Email: halfyard@danielbrownlaw.ca

Counsel for the Intervener, Criminal Lawyers' Association (Ontario)

MARIE-FRANCE MAJOR
SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener

ANDREEA BAIASU | RAOOF ZAMANIFAR
ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 10th Floor
Toronto, ON M7A 2S9

Tel: (416) 326-4600
Fax: (416) 326-4656
Email: andreea.baiasu@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS 1

A. Overview 1

B. The Intervener 2

C. Statement of Facts 2

PART II: POINTS IN ISSUE 2

PART III: ARGUMENT 2

A. A failure to take reasonable steps is part of the fault requirement of sexual offences 2

B. The independent path to conviction does not create a crime of negligence 5

C. *Morrison* should be limited to the internet sting context 6

D. The jury should not be instructed on pathways that do not arise on the evidence 8

E. All consent to sexual activity is conditional consent 10

PART IV: ORDER AND COSTS 10

PART V: TABLE OF AUTHORITIES 11

PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal addresses the fault requirement in a case of sexual assault where the complainant testified that the accused disregarded her express condition that he wear a condom throughout their sexual activity. The defence called no evidence and instead attacked the reliability and credibility of the complainant's evidence that she never consented to unprotected intercourse. The defence did not assert that the accused honestly believed that the complainant communicated consent to sexual activity without a condom, or that he took reasonable steps to ascertain that consent on that basis was present. Nonetheless, the defence also asserted that the Crown had failed to prove the *mens rea* of the offence. A jury acquitted the accused of sexual assault. A majority of the Court of Appeal of Alberta allowed the Crown's appeal and ordered a new trial.[1]

2. The intervener submits that the reasonable steps provision in s. 273.2(b) of the *Criminal Code* was drafted to prevent acquittals of men who engage in non-consensual sexual activity without having taken reasonable steps in the circumstances known to them to ascertain consent. The approach taken in the Alberta and Ontario Courts of Appeal undermines this purpose by giving the accused two opportunities to negate *mens rea*: first, limited by the reasonable steps provision (mistaken belief), and second, under a separate inquiry into *mens rea*, unconstrained by any obligation to ascertain consent. Reasonable steps fall out of the equation after the first inquiry, thus rendering them irrelevant to conviction. This approach is unworkable for triers of fact and nullifies Parliament's intent in enacting the reasonable steps provision. Section 273.2(b) was intended to ensure that only those who have at least tried to ascertain consent could be exonerated despite engaging in non-consensual sex.

3. The defence of mistaken belief in communicated consent is indistinguishable from an absence of *mens rea* with respect to consent. The only example posited in the case law where *mens rea* might be negated in the absence of reasonable steps is that of involuntary intoxication. Involuntary intoxication is an affirmative defence requiring the accused to raise an air of reality before it will be put to the trier of fact. A jury should not be charged on defences that do not arise

[1] *R v Bilinski*, 2025 ABCA 270.

on the evidence. This Court must interpret the law with the reality of sexual violence for women and girls in mind, not on the basis of remote hypotheticals. In the unlikely event that an accused is able to raise an air of reality that involuntary intoxication negated his *mens rea*, he will be entitled to an appropriate instruction on that defence. Including such a charge in every case is incorrect in law, unworkable in reality, and will have particularly negative impacts on marginalized women and girls.

B. The Intervener

4. Founded in 1973, and incorporated in 1975, Vancouver Rape Relief Society, operating as Vancouver Rape Relief and Women's Shelter (VRRWS) is the oldest continually operating rape crisis centre in Canada. Since it opened in 1973, VRRWS has operated a 24-hour rape crisis support line. In 1981, VRRWS opened a transition house for women and their children seeking to escape male violence, including women marginalized by poverty, disability, and colonialism. The collective that operates VRRWS includes women who have experienced male violence, including sexual violence. VRRWS works on issues related to sexual violence against women in collaboration with other organizations, nationally and internationally, who seek to end male violence against women and promote women's equality.

C. Statement of Facts

5. VRRWS accepts and relies on the statement of facts set out by the parties to the appeal.

PART II: POINTS IN ISSUE

6. Whether a jury should be instructed to consider the accused's knowledge of non-consent in circumstances where there is no air of reality to the defence of honest belief in communicated consent.

PART III: ARGUMENT

A. A failure to take reasonable steps is part of the fault requirement of sexual offences

7. The reasonable steps provision was introduced in 1992 for the purpose of modifying the common law that unreasonable mistakes, where men have taken no steps to inquire into consent, could still exonerate an accused who engaged in non-consensual sexual activity. Parliament

decided that an accused must take steps to ascertain whether a complainant is consenting, in light of the circumstances known to him at the time, and that failing to do so is a morally blameworthy mental state.[2]

8. The addition of the reasonable steps provision does not relieve the Crown from proving *mens rea*; Parliament has simply modified what *mens rea* has to be proven beyond a reasonable doubt. Subject to the *Charter*, Parliament is free to define the fault requirement of offences.[3] The Crown must prove the intention to apply force and, where there is evidence that the accused, having taken reasonable steps, honestly believed that the complainant communicated consent, the Crown must prove beyond a reasonable doubt that the accused knew or was reckless that the complainant was not consenting (*i.e.* that he did not hold such a belief).[4] This approach to proof of fault is not unique to sexual assault; it extends to other offences for which mistake of fact can be raised. [5]

9. The defence of mistaken belief is still largely subjective, but adds an element of reasonableness. Section 273.2 (b) accomplished a careful balance, maintaining the burden of proof beyond a reasonable doubt on the Crown while putting some responsibility on the accused to do more than not think about whether his sexual partner is consenting. As the Minister of Justice stated, introducing the Bill at second reading (at which time *all* reasonable steps were proposed) "belief in consent will not be a defence unless the accused took all reasonable steps in the circumstance known to the accused at the time to ascertain that the complainant was consenting." This approach was necessary, in the Minister's view, to reflect "the responsibilities of all people to their sexual partners" and to recognize that the "fundamental rights of women [have] redefined the way we approach our relationships."[6]

---

[2] *R v Barton*, 2019 SCC 33 at para 105.
[3] *R v Hibbert,* 1995 CanLII 110 (SCC), [1995] 2 SCR 973 at para 25.
[4] *Barton*, *supra* at para 112.
[5] *R v Bahinipaty*, 1987 CanLII 4995 (SK CA) at paras 17-18; *Regina v Metro News Ltd.,* 1986 CanLII 148 (ON CA), [1986] OJ No 826 at paras 58-59; *R v Lin*, 2022 ONCA 289 at paras 25, 30.
[6] Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 2nd reading, *House of Commons Debates*, 34th Parl, 3rd Sess, Vol 8 (8 April 1992) at p 9507 (Hon K Campbell, Minister of Justice and Attorney General of Canada).

10. The (all) reasonable steps provision was first enacted in 1987 in the context of the mistake of age defence.[7] Without a reasonable steps requirement as to age, an accused who does not turn their mind to the age of their sexual partner would be acquitted, even where the objective circumstances point to the need for further inquiry.[8] Similarly, s. 273.2(b) responds to the situation of the accused who does not turn his mind to the question of consent.[9] Not thinking about consent is a morally blameworthy state of mind because men are not entitled to assume that women exist in a presumed state of consent until they are told otherwise.[10]

11. An honest but mistaken belief in communicated consent will only arise in exceptional circumstances; people do not typically commit sexual assault *per incuriam.*[11] Mistake of fact is a denial of *mens rea* that is treated as a defence because its evidentiary foundation is within the unique knowledge of the accused.[12] The evidentiary threshold reflects a clear decision by this Court that the defence should not be left with the jury in every sexual assault case. The jury is not curtailed in its fact-finding function since it has been determined that there is no evidence capable of raising a reasonable doubt on this issue, a role that has always been for the trial judge.[13]

---

[7] *Criminal Code*, ss 273.2 (a), (b); s 150.1(4); Bill C-15, *An Act to amend the Criminal Code and the Canada Evidence Act*, 2nd Sess, 33rd Parl, 1987.

[8] The Ontario Court of Appeal in *R v Carbone*, 2020 ONCA 394 addresses this by developing a concept of "reckless indifference" in relation to age (at para 127); *R v Hason,* 2024 ONCA 369 at para 50. But recklessness is a subjective mental state that requires awareness of risk (*R v Zora*, 2020 SCC 14 at para 117) and wilful blindness requires deliberate ignorance in the face of suspicion (*Sansregret v The Queen*, 1985 CanLII 79 (SCC), [1985] 1 SCR 570 at para 22; *R v Briscoe*, 2010 SCC 13, [2010] 1 SCR 411 at para 21).

[9] *R v Esau*, 1997 CanLII 312 (SCC), [1997] 2 SCR 777.

[10] Isabel Grant and Janine Benedet, "Sexual Assault, Fault and the Charter" (2026) 57:2 Ottawa L Rev (forthcoming) at 34; *Barton*, *supra* at para 105.

[11] *R v Osolin,* 1993 CanLII 54 (SCC), [1993] 4 SCR 595 at p 686 citing *Pappajohn v The Queen,* 1980 CanLII 13 (SCC), [1980] 2 SCR 120 at p 155 per Dickson J dissenting in the result.

[12] *R v Robertson*, 1987 CanLII 61 (SCC), [1987] 1 SCR 918 at paras 24-26; *Pappajohn*, *supra* at p 148 per Dickson J.

[13] This is consistent with the principle in *R v Gunning*, 2005 SCC 27.

B. The independent path to conviction does not create a crime of negligence

12. Interpreting the reasonable steps provision as an independent path to conviction does not render sexual assault a crime of negligence. Parliament carefully calibrated the provision to include a requirement that reasonableness be evaluated against the circumstances subjectively known to the accused at the time, and to revise the original Bill C-49 to require only "reasonable steps" in those circumstances, not "all reasonable steps".[14]

13. It is well-established that Parliament can include objective elements in the *mens rea* of serious offences particularly where the crime in question deals with the safety and bodily integrity of others.[15] Parliament is entitled to create an obligation to take necessary care when engaging in activities that create a serious risk of harm to others.[16]

14. While the reasonable steps provision adds an objective component to *mens rea* for sexual assault, the subjective component remains "largely intact."[17] The provision contains both objective and subjective elements.[18] As noted by the Court of Appeal for Ontario: "[t]he provision does not require that a mistaken belief in consent must be reasonable in order to exculpate. The provision merely requires that a person about to engage in sexual activity take "reasonable steps . . . to ascertain that the complainant was consenting." Were a person to take reasonable steps, and nonetheless make an unreasonable mistake about the presence of consent, he or she would be entitled to ask the trier of fact to acquit on this basis."[19]

15. Section 273.2(b) imposes a positive duty on men to take steps to take steps to ascertain that their sexual partner is consenting. This is not an onerous requirement but is essential to promoting equality and safety for women and girls: "[t]he standard is really only quasi-objective because the

---

[14] *Barton*, *supra* at para 104; Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 3rd Sess, 34th Parl, 1992.
[15] *R v Creighton*, 1993 CanLII 61 (SCC), [1993] 3 SCR 3; *R v Naglik*, 1993 CanLII 64 (SCC), [1993] 3 SCR 122; *R v Gosset*, 1993 CanLII 62 (SCC), [1993] 3 SCR 76.
[16] *R v ADH*, 2013 SCC 28.
[17] *R v Darrach*, 1998 CanLII 1648 (ON CA), 38 OR (3d) 1 (CA) at para 90 [*Darrach* ONCA], aff'd on other grounds, 2000 SCC 46, [2000] 2 SCR 443.
[18] *R v Sanclemente*, 2021 ONCA 906 at para 91.
[19] *Darrach* ONCA, *supra* at para 90.

ostensibly objective standard of reasonableness with respect to the steps taken to ascertain consent will be coloured by whatever "circumstances known to the accused" is interpreted to mean."[20]

16. The reasonable steps provision was a key component of Bill C-49. This case, and the related appeal in *R. v. Degale*, SCC File no. 42030, will determine whether the reasonable steps provision will play any role in holding men accountable for violence against women and girls. As the National Action Committee on the Status of Women testified in the Committee hearings for Bill C-49 "If [the reasonable steps provision] is weakened, the Bill will be useless to women."[21]

C. *Morrison* should be limited to the internet sting context

17. The approach of the majority of this Court in *R. v. Morrison* should be limited to the unique context of a police sting for internet luring where there is no actual child victim.[22] The police sting context is unique because the *Code* requires the Crown to prove actual belief that the person the accused was talking to was under 16.[23] Because no child is harmed in the sting context, Parliament required the highest level of subjective fault. This context led the majority to repeatedly limit its reasons to the sting context, indicating that the police sting operation "to be clear, is the specific context to which these reasons are restricted."[24]

18. The fate of the reasonable steps provision lies in how this Court interprets two *obiter* paragraphs in *Morrison* referring to this Court's decision in *R. v. George.*[25] *George* was unequivocal that for sexual interference, once the Crown has negated reasonable steps beyond a reasonable doubt, no further *mens rea* inquiry into age is necessary.[26] The *Morrison* majority suggested to the contrary, that *George* required that "the Crown had to go further and prove beyond

---

[20] *R v Malcolm*, 2000 MBCA 77 at para 14 citing John McInnes and Christine Boyle "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29:2 UBC L Rev 341 at pp 361-62.
[21] Canada, Parliament, House of Commons, Standing Committee on Bill C-49, *Minutes of Proceedings and Evidence*, 34th Parl, 3rd Sess, No 1 (14 May 1992) at p 27 (Judy Rebick).
[22] *R v Morrison*, 2019 SCC 15, [2019] 2 SCR 3.
[23] *Criminal Code,* s 172.1(1).
[24] *Morrison*, *supra* at para 55. See also paras 81, 84-85, 95 and 101.
[25] *Morrison*, *supra* at paras 87-88 citing *R v George*, 2017 SCC 38, [2017] 1 SCR 1021 at para 8. See also *R v Cornejo*, 2003 CanLII 26893 (ON CA), [2003] OJ No 4517 at para 19.
[26] *George*, *supra* at para 8. The Crown must still prove that the accused intended to touch the complainant for a sexual purpose.

a reasonable doubt that the accused believed the complainant was under 16."[27] The majority did not say that *George* was wrongly decided, nor that it should be overruled. But if the Crown must go on and prove that an accused who did not take reasonable steps believed the complainant was under age/not consenting, then there is no meaningful role for the reasonable steps provision because the absence of reasonable steps will never lead to a conviction.[28] Justice Abella, dissenting on the *Charter* issue, held that the decision in *George* correctly stated the law and that "the *mens rea* of the offence can be established solely on the accused's failure to take reasonable steps."[29]

19. Despite acknowledging that *Morrison* was limited to the sting context, the Court of Appeal for Ontario has wrongly relied on these *obiter* statements to nullify the impact of reasonable steps provisions in the context of both age[30] and non-consent, by requiring a second distinct inquiry into fault, focusing only on knowledge or recklessness and shorn of reasonable steps.[31] The "little difficulty" instruction then becomes necessary in an attempt to salvage something from the reasonable steps provision.

20. The approach taken in British Columbia in *R. v. Angel* and subsequent cases, where no further instruction is required on *mens rea* once reasonable steps has been negated, other than proof of an intention to apply force, upholds the responsibility of men to take steps to inquire into consent or age.[32] That court noted that extending *Morrison* more broadly could undermine decades of sexual assault law reform and that "[m]ore precise reasoning by the Supreme Court of Canada than exists in *Morrison*" would be required to reach such a conclusion.[33]

---

[27] *Morrison*, *supra* at para 88.

[28] *R v Jerace*, 2021 BCCA 94 at para 37 held that the language in *George*, unlike that in *Morrison*, was clear and binding. Isabel Grant and Janine Benedet, "Unreasonable Steps: Trying to Make Sense of *R v Morrison*" (2019) 67:2 Crim LQ 14 at 28.

[29] *Morrison*, *supra* at para 211.

[30] *R v HW,* 2022 ONCA 15 following *R v MacIntyre*, 2019 CMAC 3.

[31] *HW*, *supra* at para 8.

[32] *R v Angel*, 2019 BCCA 449; *Jerace*, *supra* at para 33; *R v Seangio,* 2024 BCCA 143 at para 90. There is no reason why the clear finding in *Angel* that *Morrison* is limited to the internet sting context would not also apply to sexual assault.

[33] *Angel,* supra at para 51. This approach has also been adopted in Manitoba: see *R v Ryall,* 2024 MBCA 105 at para 21 and *R v Gratton*, 2023 MBCA 29 at para 18.

D. The jury should not be instructed on defences that do not arise on the evidence

21. It is not necessary to routinely instruct the jury to consider the possibility that the Crown may have failed to prove *mens rea* in circumstances where there is no air of reality to one or both elements of the defence of mistaken belief in communicated consent. It is not logically possible for the jury to consider whether knowledge is proven while being told not to consider the accused's belief. As Hamish Stewart notes, these inquiries "if not actually inconsistent, are in extreme tension with each other".[34] The approach to fault endorsed by the Court of Appeal for Ontario in *H.W.*[35] and by the Court of Appeal in the case at bar, amounts to saying that in every sexual assault case *mens rea* must be considered twice: once with the reasonable steps provision (under the label of mistake) and once without (in a *mens rea* instruction that makes no reference to failure to take reasonable steps). This is incorrect in law and effectively nullifies the effect of the reasonable steps provision.

22. The Intervener is not aware of any actual cases in which the evidence could support a conclusion that the Crown failed to prove *mens rea* other than on the basis of a reasonable doubt as to a mistaken belief accompanied by reasonable steps. The only example posited in the case law of evidence that might create a reasonable doubt in belief in consent is that of involuntary intoxication on the part of the accused. This hypothetical is designed to address cases where the accused "through no fault of [his] own" never thought about consent.[36] A claim of intoxication negating an element of the offence, whatever its source, requires an evidentiary foundation in the form of an air of reality.[37] A defence that negates an element of the offence is still treated as a defence. Instructing the jury in every case to consider knowledge or recklessness in order to account for this remote possibility is wrong in law. Where such an evidentiary foundation exists, the accused will be entitled to such an instruction.

23. Other hypotheticals that imagine scenarios in which an accused takes no steps to ascertain consent or age because the circumstances suggest erroneously that age/consent is present, are dealt

---

[34] Hamish Stewart, "Fault and 'Reasonable Steps': The Troubling Implications of *Morrison* and *Barton*" (2019) 24 Can Crim L Rev 379 at p 380.
[35] *HW, supra.*
[36] *HW*, *supra* at para 78 citing *MacIntyre*, *supra* at para 65.
[37] *R v Lemky*, 1996 CanLII 235 (SCC), [1996] 1 SCR 757; *R v Harris*, 2019 BCCA 166 at paras 21 and 49.

with by the elements of the defence of mistaken belief. An accused is only required to take the steps that are reasonable on the facts known to him which, in rare cases, may support proceeding on the basis of one's affirmative belief, without further inquiry.[38] This is different than not thinking about consent or age at all, which is a blameworthy state of mind. An acquittal for an accused who never thinks about communicated consent is "precisely the result that the reasonable steps requirement was (one would have thought) intended to prevent."[39]

24. Where the trial judge determines that there is no air of reality to the accused's belief in communicated consent and/or that there is no air of reality to the accused having taken reasonable steps, in the circumstances known to him at the time, to ascertain that consent is present, the jury should simply be instructed that the case turns on the question of consent or no consent, with the appropriate cautions about the Crown's burden of proof and the need to avoid a credibility contest when applying reasonable doubt. The jury should also be instructed that the Crown must prove that the application of force was intentional. Such an instruction is consistent with this Court's repeated confirmation that belief in consent is not to be left with the jury in every sexual assault case.[40]

25. This case will have important implications for the "all reasonable steps" requirement in relation to age. A second inquiry into fault with respect to age will particularly endanger girls and youth who initially present as older as a result of prior sexual exploitation by adults, and where the accused gives no thought to age.[41] These are the youth who most need the protection of the reasonable steps requirement. Similarly, women who are intoxicated, women with mental disabilities, and women who are unable to testify, including because of sexual assaults that result in death, are the most affected by an approach to fault that sidelines reasonable steps and acquits an accused based an absence of evidence that the complainant did not communicate her consent.[42]

---

[38] *R v Tannas*, 2015 SKCA 61.
[39] Stewart, *supra* at p 400.
[40] *R v Park*, 1995 CanLII 104 (SCC), [1995] 2 SCR 836 at paras 27-31; *R v Robertson,* 1987 CanLII 61 (SCC), [1987] 1 SCR 918 at para 35.
[41] Isabel Grant, "The Slow Death of the Reasonable Steps Requirement for the Mistake of Age Defence" (2021) 44:4 Man LJ 1.
[42] *R v Degale,* 2023 ONCJ 346; appeal allowed *R v Degale*, 2024 ONCA 720, SCC File No 41525 (appeal pending).

E. All consent to sexual activity is conditional consent

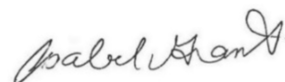
26. This appeal raises the issue of fault and belief in consent in the context of an allegation that the accused removed a condom during sexual intercourse, contrary to the complainant's express condition that it be worn. This context does not change the analysis with respect to *mens rea* and mistake of fact. All consent to sexual activity is conditional. Consent must be specific to the sexual acts in question and the identity of one's sexual partner, as well as in existence contemporaneous with the acts when they are occurring.[43]

27. For the Crown to prove the *actus reus* of the offence, a jury would need to be satisfied that the complainant made condom use part of the sexual activity in question, and that the accused did not use one at some point during that sexual activity. For the accused to assert that he believed that the complainant had changed her mind, there would need to be evidence both of his belief that this change was affirmatively communicated and that he took reasonable steps in the face of that communication, and all the other circumstances known to him, to ascertain whether the complainant was agreeing to continue without a condom. In the absence of such evidence, there would be no other scenario on which the accused could have failed to be aware of the complainant's lack of consent, and no need to leave the jury with a possibility that did not arise on the evidence.

PART IV: ORDER AND COSTS

28. The Intervener Vancouver Rape Relief intervenes purely on the interpretation of the law at issue in this case and takes no position on the outcome of the appeal. The Intervener does not seek costs and respectfully asks not to have costs ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF MAY, 2026



JANINE BENEDET, K.C. **ISABEL GRANT**

Counsel for the Intervener, Vancouver Rape Relief Society

---

[43] *R v JA*, 2011 SCC 28 at para 34; *R v GF*, 2021 SCC 20 at paras 29, 45.

PART V: TABLE OF AUTHORITIES

Case	**Paragraph Cited**
Pappajohn v The Queen, 1980 CanLII 13 (SCC)	11
R v ADH, 2013 SCC 28	13
R v Angel, 2019 BCCA 449	20
R v Bahinipaty, 1987 CanLII 4995 (SK CA)	8
R v Barton, 2019 SCC 33	7, 8, 10, 12
R v Bilinski, 2025 ABCA 270	1
R v Briscoe, 2010 SCC 13	10
R v Carbone, 2020 ONCA 394	10
R v Cornejo, 2003 CanLII 26893 (ONCA)	18
R v Creighton, 1993 CanLII 61 (SCC)	13
R v Degale, 2023 ONCJ 346	25
R v Degale, 2024 ONCA 720	25
R v Darrach, 1998 CanLII 1648 (ONCA)	14
R v Esau, 1997 CanLII 312	10
R v GF, 2021 SCC 20	26
R v George, 2017 SCC 38	18
R v Gosset, 1993 CanLII 62 (SCC)	13

R v Gratton, 2023 MBCA 29	20
R v Gunning, [2005] 1 SCR 627	11
R v HW, 2022 ONCA 15	19, 21, 22
R v Harris, 2019 BCCA 166	22
R v Hason, 2024 ONCA 369	10
R v Hibbert, 1995 CanLII 110	8
R v JA, 2011 SCC 28	26
R v Jerace, 2021 BCCA 94	18, 20
R v Lemky, 1996 CanLII 235 (SCC)	22
R v Lin, 2022 ONCA 289	8
R v MacIntyre, 2019 CMAC 3	19, 22
R v Malcolm, 2000 MBCA 77	15
R. v. Morrison, 2019 SCC 15	17, 18
R v Naglik, 1993 CanLII 64 (SCC)	13
R v Osolin, 1993 CanLII 54 (SCC)	11
R v Park, 1995 CanLII 104 (SCC)	24
R v Robertson, 1987 CanLII 61 (SCC)	11, 24
R v Ryall, 2024 MBCA 105	20

R v Sanclemente, 2021 ONCA 906	14
R v Seangio, 2024 BCCA 143	20
R v Tannas, 2015 SKCA 61	23
R v Zora, 2020 SCC 14	10
Regina v Metro News Ltd., 1986 CanLII 148 (ONCA)	8
Sansregret v The Queen, 1985 CanLII 79 (SCC)	10

Legislation	**Paragraph Cited**
***Criminal Code*, R.S.C. 1985, c. C-46**	
s. 150.1	10
s. 172.1(1)	17
s. 273.2	9, 10, 12 ,15
***Code criminel*, L.R.C. 1985, c. C-46**	
art. 150.1	10
art. 172.1(1)	17
art. 273.2	9, 10,15

Secondary Sources	**Paragraph Cited**
Bill C-15, *An Act to amend the Criminal Code and the Canada Evidence Act*, 2nd Sess, 33rd Parl, 1987	10

Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 3rd Sess, 34th Parl, 1992	12
Canada, Parliament, House of Commons, *Debates*, 34th Parl, 3rd Sess, Vol 8 (8 April 1992)	9
Canada, Parliament, House of Commons, Standing Committee on Bill C-49, *Minutes of Proceedings and Evidence*, 34th Parl, 3rd Sess, No 1 (14 May 1992)	16
Hamish Stewart, "Fault and 'Reasonable Steps': The Troubling Implications of *Morrison* and *Barton*" (2019) 24 Can Crim L Rev 379	21, 23
Isabel Grant, "The Slow Death of the Reasonable Steps Requirement for the Mistake of Age Defence" (2021) 44:4 Man LJ 1	25
Isabel Grant and Janine Benedet, "Unreasonable Steps: Trying to Make Sense of *R v Morrison*" (2019) 67:2 Crim LQ 14	18
Isabel Grant and Janine Benedet, "Sexual Assault, Fault and the Charter" (2026) 57:2 Ottawa L Rev (forthcoming)	10