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Case Comment

The Child Luring Offence and *R. v. Morrison*: Applying Reasonable Steps to an Inchoate Offence Generates Legal and Constitutional Problems

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1. INTRODUCTION

The laudable goals of the s. 172.1 child luring legislation are beyond reproach: to protect children from online predators who would use the Internet for exploitation. The laws are structured broadly, permitting sting operations as an investigative tool, placing the focus on the accused's belief. As with all attempts to proscribe illegal conduct, the lines separating illegal, questionable and legal behaviour are blurry. Police use this legislation routinely to virtue test potential targets, often leading to criminal charges. [1] Two common sting operations bring to focus the problems with the new reasonable steps formulation in *Morrison*. [2]

One scenario is the bait and switch sting operation, where police post an online ad for sexual services with a legal age to bait a target and then switch to an illegal one after a legal age arrangement has been made. Another scenario includes stratagems such as those used in *Morrison* where police virtue test legitimate role-players by playing the part of an underage person. In both scenarios, it is not obvious that the accused who does not disengage quickly or continues the cyber exchange without taking reasonable steps to ascertain age is guilty of a crime. Yet child luring charges are routinely laid.

In these prosecutions, the accused began his online communication with the obvious intent to act lawfully, and by a twist of fate, became mired in the criminal justice process. In many of these cases, the moral blameworthiness is thread bare, grounded largely on ignorance of the law or a cat and mouse game where the undercover officer avoids answers to questions that might unravel the sting or demonstrate the accused's innocence. If the end goal of the sting operation is to catch a “predator,” these scenarios

are not exactly shining models ***306** of the laudable goal of the child luring law in action. These schemes use the law as a sword, often creating an offence when none existed. Section 172.1 does not seek to proscribe all forms of sexualized chats on the Internet to avoid any possibility of committing the enumerated offences. Nor did it invoke the notwithstanding clause. The statute must therefore be interpreted in a manner consistent with civil liberties and fundamental rights.

2. ISSUES

(a) The *Morrison* Reasonable Steps Formulation for Child Luring: An Overview

The Supreme Court's approach to reasonable steps in *Morrison* diverged from years of law reform and precedent in sexual assault law.[3] For a child luring sting offence, a failure to take reasonable steps, is no longer an independent pathway to conviction. An accused who fails to take reasonable steps may still be acquitted if the Crown fails to prove beyond a reasonable doubt he believed or was wilfully blind to the fact that the person with whom he was communicating ("the communicant" or "the interlocutor") was underage. This part of the new formulation was forced by the disparity of fault between failing reasonable steps and the offence itself and is therefore not problematic. This was the major point of departure with the Ontario Court of Appeal decision.[4]

The new formulation however falls into murky territory because it attaches a punitive consequence to failing the reasonable steps inquiry: the accused cannot testify and assert a legal age belief unless he passes it. This penalty compounds the aforementioned problems because it forces an accused who began his cyber communications lawfully, and continued to have a lawful belief throughout, to go to trial without the benefit of being able to profess his innocence. Puzzlingly, the *Morrison* majority implemented this sanction despite conceding that the reasonable steps inquiry was not a dispositive answer to guilt, only a "good indication" of it.[5]

(b) Problems with the *Morrison* Formulation: An Overview

This article will endeavour to show why and how the *Morrison* interpretation of s. 172.1(4) ("ss. 4") should be reformulated. The following is a brief overview of the arguments to be advanced in this article.

***307** The main problem with the reasonable steps formulation is that it treats the communicant's underage representation as a proven fact. For a sting offence, the only iteration of child luring that the *Morrison* majority dealt with, an underage communicant is never proven as true. The truth of an underage communicant matters to the construction of the offence-- when it cannot be proven, the offence is inchoate and

can only be about the accused's belief. An objective component like reasonable steps cannot condition an offence whose fault lies only in belief. The new formulation violates s. 11(d) of the *Charter* by arbitrarily linking reasonable steps to the highly punitive sanction of denying the accused his right to deny guilt.[6] Had the *Morrison* majority given full consideration to the inchoate character of the child luring offence, this result might have been avoided.

When the culpable fact is not proven true in the evidence, wilful blindness, which is akin to knowledge, it is not an available *mens rea* because knowledge requires belief and truth. One cannot be wilfully blind to something that does not exist as true. The person can believe the falsely represented fact, but he cannot know it to be true, and therefore cannot be wilfully blind to that fact. Despite a lengthy analysis about why the deemed belief in s. 172.1(3) ("ss. 3") was not efficacious and thus unconstitutional, the new formulation is rooted in the very same erroneous underpinning that a representation by the communicant is a proven fact in the case.

The s. 172.1 child luring offence is primarily an inchoate crime that in rare instances operates analogously to choate sexual offences like s. 151 and s. 152. Reasonable steps can apply to these latter situations but should have no application to an inchoate construction of the offence.

The inchoate iteration includes sting offences, but should also include all interactions between an accused and interlocutor that are wholly by telecommunication device because the accused cannot reasonably discern age in these situations. Reasonable steps should not apply to this version of the child luring offence because it is also only concerned with the accused's belief about the interlocutor's age.

Reasonable steps should, however, apply to a construction of the child luring offence that operates in a more choate manner, such as where the Crown proves the communicant is underage and the accused can reasonably discern age because of, for example, a prior non-telecommunication interaction with the communicant. When the accused deals in person with the eventual communicant, the construction aligns more closely to a choate offence. Reasonable steps could then operate as they do for sexual offences against minors, making recklessness a suitable fault element, thereby enabling reasonable steps to serve as an independent pathway to guilt.

***308** In situations where reasonable steps have no application to the child luring offence, judges and juries should be entrusted to make findings about the accused's fault or *mens rea*, as they do every day for all other offences in the *Criminal Code* and other penal statutes.

Finally, if the limited context to which this decision applies is not confined, it also has the potential to creep into the construction of reasonable steps for other sexual offences, unravelling years of advances in sexual assault law. [7]

3. FAULT (OR *MENS REA*), MISTAKE OF FACT AND REASONABLE STEPS

(a) The Fault Approach

The s. 172.1 scheme has three elements: (i) communication via telecommunication; (ii) with a person who is or who the accused believes is under the relevant age of consent; and (iii) for the purpose of facilitating the commission of one of the enumerated sexual offences. The accused can negate criminal liability by arguing that he believed the communicant was of legal age, but the s. 172.1(4) reasonable steps provision states:

> It is not a defence to a charge under [s. 172.1(1)] that the accused believed the [complainant] was at least [the relevant age] unless the accused took reasonable steps to ascertain the age of the [complainant].

Prior to the Supreme Court ruling in *Morrison*, there existed two independent pathways to conviction: (1) where the Crown proved beyond a reasonable doubt an affirmative belief that the person he was speaking to was underage; or (2) where the accused failed to demonstrate he took reasonable steps to ascertain the legal age of the communicant. [8] Failing to take reasonable steps provided an independent pathway to conviction. This is what Professor Hamish Stewart has called "*the fault approach*." [9] The same terminology will be used herein.

(b) The Defence-Limiting Approach

After *Morrison*, failing to take reasonable steps no longer provides an independent pathway to conviction. Consistent with the language of s. 172.1(1), ***309** the Crown must prove the accused believed the interlocutor was underage. [10] Only belief or wilful blindness will suffice; recklessness or negligence will not. [11] An accused's claim to a legal age belief is now characterized a "defence," [12] for which the accused must satisfy an air of reality test. [13] An air of reality test is a straight forward and mandatory test for the invocation of a defence. [14] However, the "defence" created in *Morrison* bears no resemblance to traditional defences because, as discussed below, it amounts to branding an accused's denial of *mens rea* as a "defence."

The air of reality test is satisfied when the accused shows, as a matter of law, there is some evidence that reasonable steps were taken to ascertain the legal age of the communicant. The *Morrison* majority established strict criteria to determine what a reasonable step is--certain types of evidence, though ostensibly a step, will not qualify.[15] It is not clear, as discussed below, whether this air of reality configuration meets the constitutional strictures set out in *Osolin*.[16]

If the defence moves forward, the trier of fact decides whether the accused took reasonable steps to ascertain the communicant's age. If the Crown fails to prove beyond a reasonable doubt the accused did not take reasonable steps, barring contradictory statements by the accused or other such evidence, an acquittal is virtually certain.[17]

If the Crown is successful in proving reasonable steps were not taken, the Crown must still prove beyond a reasonable doubt that the accused believed the interlocutor was underage.[18] Only belief or wilful blindness will suffice; recklessness or negligence will not.[19] On this final burden, the whole of the evidence is considered (including the evidence relating to the failed reasonable steps),[20] except for the accused's claim about having a legal age belief.[21] This is ***310** what Professor Hamish Stewart has called the "*defence-limiting approach*."[22] This terminology will also be used herein.

(c) Mistake of Fact and Reasonable Steps

Reasonable steps were created to limit mistake of fact defences.[23] Reasonable steps are used in the *Criminal Code* for sexual offences to restrain claims of mistake of fact regarding consent or age for sexual activity by demanding that a subjectively held mistaken belief be objectively verifiable in the circumstances known to the accused at the time.[24] When the culpable fact in issue is proven in evidence by the Crown, the accused can defend by challenging the existence of the fact or by embracing the fact as true and claiming a *mistake of fact* to negate his *mens rea*. The fault generated from failing to take reasonable steps is at least a form of recklessness, ranging from reckless indifference, recklessness, belief or wilful blindness.[25] Because recklessness is the *mens rea* for sexual assault and the various offences involving sexual activity with children,[26] conditioning a mistake of consent or age defence with a reasonable steps requirement provides a congruence of fault to enable the inquiry to operate neatly as an independent pathway to conviction.[27] Where the *mens rea* for an offence requires belief and excludes recklessness, such as child luring in the sting context,[28] it is self-evident that the reasonable steps inquiry is incapable of providing a dispositive answer

about guilt. When belief is the minimum fault, an unreasonably formed but honestly held belief mandates an acquittal. [29]

*311 (d) The Bedrock Principle Approach

All prosecutions where the fault approach provides an independent pathway to guilt have two features in common: (i) the culpable fact in issue is proven true in evidence; and (ii) the fault (or the *mens rea*) for the substantive offence is at least recklessness. Both these features are absent in a child luring sting prosecution.

In respect of the first point, it follows that should the Crown fail to prove in evidence the culpable *fact* in issue, no *mistake of fact* is possible, and the reasonable steps inquiry is circumvented. In a child luring sting offence prosecution, the Crown cannot prove an underage person communicated with the accused. Without a proven culpable fact, reasonable steps should not apply because there is no mistake of fact to speak of.

In respect of the second point, the reasonable steps inquiry fails as an independent pathway for conviction because the minimum *mens rea* for the child luring sting offence excludes recklessness and demands only belief. The fault approach is efficacious only when the fault elements are aligned. The defence-limiting approach chosen by the *Morrison* majority is certainly one approach to dealing with this fault incongruity for the child luring sting offence. Another solution is what Abella J. advanced in dissent: eliminate reasonable steps altogether for the child luring offence and rely solely on the Crown's ultimate burden to prove the *mens rea* for the offence. This approach may be termed a "*bedrock principle*" approach, to borrow the term Moldaver J. used to describe the Crown's constant and overriding onus to "show, on the evidence as a whole, that all of the essential elements of the offence in question have been proved beyond a reasonable doubt." [30]

(e) Reasonable Steps Have Never Been Mandatory

The defence-limiting approach, while undoubtedly a valiant attempt to arrive at a happy medium between the fault approach and the bedrock principle approach for the child luring sting offence, aligns poorly with established legal principles and falls short of meeting constitutional standards. Just because reasonable steps exist in a statutory scheme does not mean they must have a role in every iteration of the offence.

In a sexual assault trial, the accused's claim to an honest but mistaken belief in communicated consent is but one step to the activation of the reasonable steps requirement in s. 273.2(b). The first step is the Crown proving the inculpatory fact in issue, that the complainant did not consent to the sexual activity. Without this proof,

there is no offence possible and reasonable steps has no application.[31] ***312** If the accused's position is that the complainant communicated consent, the issue is credibility and the reasonable steps inquiry has no application.

In a sexual interference trial, the Crown must prove the underage nature of the complainant, failing which a s. 151 offence is not possible. That proof however, does not prove the accused's belief about the complainant's age and it most certainly does not trigger the reasonable steps provisions in s. 150.1(4). The reasonable steps requirement in s. 150.1(4) is triggered if and only if the accused, by his position, chooses to accept the inculpatory fact and defend against it. If the accused's position is that he did not have sexual relations with the complainant or that the complainant was actually of legal age, the reasonable steps inquiry has no application.

The determination of available defences for all criminal offences, including the question of whether an inchoate or choate offence was committed, is always guided by the evidence in the trial and the evidence of the accused.[32] Therefore, the applicability of ss. 4 to a child luring prosecution must be guided by the entirety of the trial evidence in combination with the evidence and position of the accused.

The logical solution is to abandon the defence-limiting approach, in favour of a bedrock principle approach, because the mandatory reasonable steps inquiry does not answer the question of guilt and the punitive sanction arbitrarily obstructs the accused's path to an acquittal. This alternative becomes more compelling when the inchoate nature of the offence is factored into the analysis.

4. THE INCHOATE AND CHOATE CHARACTER OF THE CHILD LURING OFFENCE

(a) The Original Design of s. 172.1

The original design of s. 172.1 adhered to the fault approach by using ss. 3 to impute an underage belief on the accused when an underage representation was made. When ss. 3 activated, the accused was forced to claim a mistake of fact that would be restrained by the reasonable steps inquiry in ss. 4.[33] Failing that ***313** inquiry acted as an automatic pathway to conviction.[34] Thus, the deemed belief in ss. 3 was originally conceived as the answer to the mistake of fact problem. This is seen inductively from the *Morrison* majority's comments at para. 96:[35]

> **96** Because the presumption under s. 172.1(3) is no longer of any force or effect, the Crown cannot secure a conviction by proving that the accused

> failed to take reasonable steps to ascertain the other person's age once a representation as to age was made. Instead, the Crown must prove beyond a reasonable doubt that the accused *believed* the other person was underage. [original emphasis]

Section 172.1(3) was an essential component of the child luring sting prosecution because the telecommunication requirement, along with the inchoate nature of the offence, made it impossible to prove the truth of an underage communicant without it. Without that proven culpable fact, there is no mistake of fact for reasonable steps to condition. [36]

The *Morrison* Court's unanimous decision to strike down the ss. 3 deemed belief provision upheaved the construction of the entire s. 172.1 offence. Without a deemed belief provision, the *Morrison* majority was correct to conclude at paragraph 96 that the fault approach could no longer apply--this was straightforward. The more difficult issue to resolve was what role, if any, would ss. 4 have in the new formulation of the offence. The *Morrison* majority crafted a defence-limiting role for reasonable steps. But reasonable steps were designed to condition a mistake of fact defence. Is a mistake of fact possible for a child luring sting offence? Respectfully, the law of inchoate offences reveals that the answer is no.

(b) *USA v. Dynar*: Inchoate (Incomplete) vs Choate (Complete) Offences

Child luring is primarily an inchoate offence. [37] It criminalizes conduct that precedes the commission of the enumerated predicate offences if its purpose is to ***314** facilitate the commission of an enumerated predicate offence against a minor. [38] The wording of s. 172.1, with its references to “who is” and “who the accused believes is,” suggests two distinct pathways to commit the offence. The principles of choate and inchoate law discussed in the Supreme Court of Canada's decision *United States v. Dynar*, [39] lend support to a dual interpretation of s. 172.1. A closer look at *Dynar* is required.

The Supreme Court held in *Dynar* that an attempt to do the factually impossible can ground criminal liability, setting the groundwork for a wider use of sting operations. *Dynar* was set against the double criminality rule for extradition. The offences at issue, s. 462.31(1) of the *Criminal Code* and s. 19.2(1) of the *Narcotic Control Act*, were structured as complete offences and only allowed for conviction if the accused had knowledge that the laundered money was the proceeds of crime which necessarily meant that real proceeds of crime had to be proven in evidence. [40] The offence alleged by the requesting state, however, was inchoate. Mr. Dynar had been ensnared in a sting

operation where he was accused of attempting to launder fake proceeds of crime, since legitimate government money was used as bait. After the date of the alleged offence, the offences were amended so that "knowing" was changed to "knowing or believing,"[41] codifying both a complete and incomplete offence.[42] The *Dynar* Court was therefore forced to consider whether the *Criminal Code's* s. 24 general attempt provision had the same net effect as including the word believing. The court found that it did, and extradition was ordered.[43]

The reasoning behind the decision to extradite is important for the purposes of this article. "Because it is not possible to know what is false," the court found that Mr. Dynar could not have committed the complete offence of money laundering since "no one who converts money that is not in fact the proceeds of crime commits these offences."[44] Knowledge is defined as true belief.[45] Citing ***315** Glanville Williams, the court held that "[t]he word 'know' refers exclusively to true knowledge"--we cannot be said to "know" something that is not so.[46] Because "proof of knowledge requires proof of truth,"[47] and the money was not in fact proceeds of crime, Mr. Dynar "could not possibly have known that it was the proceeds of crime," and therefore he could not be guilty of a complete offence.[48] The parallels to the child luring sting offence are self-evident.

He was, however, potentially guilty of attempting to launder proceeds of crime.[49] The crime of attempt consists of an intent to commit the completed offence together with some act more than merely preparatory taken in furtherance of the attempt.[50] Referencing, "the pickpocket who reaches into the empty pocket and the man who takes his own umbrella from a stand believing it to be some other person's umbrella," the court held that an incomplete crime, whether thwarted by "physical impossibility" or thwarted "following completion," are both criminal attempts.[51] Both examples were thwarted by an "attendant circumstance" or a fact, the absence of a wallet to steal in one and an umbrella that could not be stolen in the other.[52] Therefore, the fact that the money was not truly proceeds of crime was not relevant to the crime of *attempted* money laundering.[53] Again, the parallels to the child luring sting offence are self-evident.

The court in *Dynar* also explained the meaning of knowledge and belief and their interplay vis-à-vis the concept of *mens rea* for a crime, at paragraph 69: "... knowledge, for legal purposes, is true belief. Knowledge therefore has two components - truth and belief - and of these, only belief is mental or subjective ..... Knowledge as such is not then the *mens rea* of the money-laundering offences. Belief is."

Based on this clarification, the *Dynar* Court made clear that the truth of a person's belief that money was actually proceeds is distinct from the belief itself--the truth of the belief is an *attendant circumstance* that, if proven, makes a complete offence possible.[54] If the fact of the attendant circumstance is not proven true, only an attempt is possible.[55] Using the crime of murder as an example, the *Dynar* Court explained, at paragraph 71, that:

> ***316** ... the successful commission of the offence of murder presupposes both a belief that the victim is alive just before the deadly act occurs and the actual vitality of the victim at that moment. Both truth and belief are required. Therefore, knowledge is required. But this does not mean that the vitality of the victim is part of the mens rea of the offence of murder. Instead, it is an attendant circumstance that makes possible the completion of the actus reus, which is the killing of a person. [Underlining added for emphasis.]

The law of attempt is meant to capture the person whose guilty intent to commit the complete crime was frustrated by an attendant circumstance. The court noted that, "[a] person who enters a bedroom and stabs a corpse thinking that he is stabbing a living person has the same intention as a person who enters a bedroom and stabs someone who is alive."[56] The former is guilty of attempted murder while the latter is guilty of murder, the difference being only that the attendant circumstance, or the culpable fact, of a living person is not proven in the former case and proven in the latter.

Therefore, the truth of the attendant circumstance, or put another way, the truth of the culpable fact matters to the construction of an offence. The construction of the child luring offence must adhere to the principles in *Dynar*.

(c) Section 172.1(1) Codifies Two Ways to Commit the Offence

All three subsections of s. 172.1 state that when a person, "communicates with a person who is, or who the accused believes is, under the age of [x] years," the offence is committed. The object of the offence is undoubtedly to target telecommunication with an actual underage person or someone represented to be underage. In respect of the sting enabling "who the accused believes is" component, the fault is belief as per the ordinary meaning of the legislation and as per the *Morrison* majority,[57] whose decision was

confined to the sting offence.[58] The "who the accused believes is" offence is therefore purely inchoate since the actual age of the interlocutor is irrelevant to the offence.

It is noteworthy that a fault element is not specifically defined in respect of the "who is" component.[59] The s. 151 and s. 152 offences refer to age in a similar manner--they do not "[speak] to any *mens rea* as it relates to the complainant's ***317** age."[60] Put another way, they do not specify that the accused must *know* the complainant's age, only that the Crown must prove the complainant is underage. Therefore, as Doherty J.A. explained in *Carbone*, the reasonable steps requirement in s. 150.1(4) creates a *mens rea* component for these offences by requiring the Crown to prove the absence of a reasonable mistaken belief with respect to the complainant's age.[61]

Applying the principles in *Dynar*, proof of the culpable fact of an underage interlocutor is the attendant circumstance of the "who is" iteration of the child luring offence, just as an underage complainant is the attendant circumstance for the s. 151 and s. 152 offences. Subject to the discussion below about the limitations of a telecommunication based offence, when there is a proven underage interlocutor, the "who is" component may allow a construction to the child luring offence with more choate features. Because child luring criminalizes conduct that precedes the commission of the predicate offences if its *purpose* is to facilitate their commission, even a "who is" child luring offence will have inchoate features because its focus is to to catch predators before they strike.

(d) The Inchoate Offence is Only About Belief

The inchoate nature of the child luring offence necessitates only the highest level of *mens rea*. Demanding only the highest level of fault, like belief, is consistent with jurisprudence leaning toward purely subjective intent as the only acceptable *mens rea* for inchoate offences.[62] This may be for good reason, for in these situations, the accused never really completes the *actus reus* of the offence--the only issue at play is the accused's mental state, his belief. Therefore, recklessness, while acceptable as a fault element for the complete offence of murder, is not acceptable as a fault element for the inchoate offence of attempt murder, neither as a principal nor as a party.[63] This reasoning can be transposed to child luring as compared to the enumerated sexual offences against minors: recklessness, while acceptable as a fault element for the enumerated sexual offences, is not acceptable as a fault element for the inchoate offence of child luring.

***318** (e) The Purpose Element is Inextricably Linked to Belief

To establish guilt under s. 172.1, two mental elements must be satisfied: purpose and belief. [64] The trier of fact must find the accused's underlying intention for speaking to the interlocutor was to eventually commit one of the enumerated sexual offences on that individual whom he believed was underage. Even if his purpose was to engage in sexual acts with the person with whom he was communicating with, he could not have had as his ultimate goal engaging in sexual acts with a minor unless he believed the interlocutor was underage. [65] In this way, the two elements are linked: a finding of subjective belief in legal age automatically rules out the purpose element of the offence. [66]

(f) The *Morrison* Formulation Presumes the Underage Representation is True

A transcript of a digital conversation where the communicant repeatedly claims to be underage does not and cannot ever hope to prove that the communicant was underage for the purposes of proving that culpable fact. An underage representation made during a sting operation is no more believable as it is provable as true. This was the very basis for striking down ss. 3. Without this culpable fact proven in evidence, on what basis does the accused claim a mistake of fact defence? Without a mistake of fact claim, what basis is there for imposing reasonable steps? The new formulation therefore attaches the reasonable steps inquiry to the formation of a belief that, by definition, does not even have to be reasonable to garner an acquittal.

This conundrum becomes palpable when the obvious question is asked: how exactly is the culpable fact (of an underage communicant) proven true in a sting operation? The answer is that it is never proven true for a sting offence because it is wholly irrelevant. It is irrelevant, as *Dynar* explains, because the offence is only about belief. This issue was not mentioned or addressed in *Morrison*. With respect, this is a significant void in the legal analysis that led to the new formulation.

The minority judgment discussed the concept of mistake of fact without ever dealing with how the culpable *fact* of an underage communicant was proven as true in a sting offence prosecution. The concept of mistake of fact was referenced at length by Abella J., consistent with the statements in this article. [67] The question of how the accused could be said to have made a *mistake*, however, was not discussed. It was simply assumed that the underage representation by the interlocutor was the proof, despite the fact that ss. 3 had been struck down.

The majority did not mention the concept of mistake of fact at all in their judgment, instead framing the issue as the “defence” of belief in a legal age ***319** interlocutor. This approach, however, does not shield the majority from similar criticism because the majority judgment was also grounded on the same flawed conclusion that a culpable fact was proven in evidence. This is seen from the fact that wilful blindness was put

forward as an alternative to belief by the *Morrison* majority. A person who is wilfully blind is said to have *knowledge* of the fact about which he is wilfully blind.[68] The majority itself referenced several definitions of wilful blindness that define this level of fault as "equivalent to knowledge."[69] *Dynar* instructs that knowledge is defined as true belief, meaning a person cannot be said to know something which is not so,[70] and that knowledge requires proof of truth.[71]

The problem with putting forward wilful blindness as an alternative to belief is that the attendant circumstance of an underage communicant is not proven true in a sting offence prosecution. It is impossible to have knowledge of an underage communicant because it is simply not so.[72] It follows therefore, that if knowledge is not possible, neither is wilful blindness. By putting forward belief *or wilful blindness* as a fault for the sting offence of child luring, the majority also incorrectly presumed that an underage representation by the interlocutor was true. Working from this underpinning has the same net effect as keeping ss. 3 in place, a situation unanimously determined to be unconstitutional.

(g) Reasonable Steps Operate Unfairly When Applied to a Belief Offence

Failing to take reasonable steps in the new formulation means the accused cannot raise the newly created "defence of belief in a legal age." Branding the new rule a "defence," does not alter the fact that the accused will not be permitted to deny the *mens rea* of the offence unless he takes reasonable steps to inform his belief, based on a complicated test laid out by the majority.[73] This begs the question of how effective reasonable steps really are to determining whether an honest belief in a legal age was formed. Are they sufficiently effective to justify the sanction of denying the accused the right to deny guilt?

For the sting offence, a police officer poses as an underage child. The officer is in control of what information the accused has available for the formation of his legal age belief, and therefore the evidence that will be brought at trial. The officer may use language that signals immaturity, sign on at times that are typically after school hours, or speak about things that a typical child would speak about. It is up to the officer whether to incorporate images, video, and voice chat through telephone or other means of communication, or if and when to arrange to meet in person for a potential arrest.

***320** Imposing a reasonable steps duty on an accused in a police sting operation puts the accused in a precarious position. The police officer can choose to purposefully delay confirmation of age by not answering telephone calls, not asking or answering questions that would make the accused's intentions more obvious, or choosing to strategically

withhold or delay the release of requested photographs or identification. By controlling the information the accused is exposed to and strategically withholding information, the officer can make it appear as if the accused did not do enough to ascertain legal age. In every case, the police officer has the power to bring the accused closer to a conviction by the manner in which the evidence is gathered.

This situation is made worse by the way reasonable steps were defined. On behalf of the *Morrison* majority, Moldaver J. stated that reasonable steps required, among other things, asking for and receiving a photograph or proof of identification. [74] In *Morrison* itself, the accused who testified he was role-playing, more than once asked the police officer on the other end for photographs, yet the police officer failed to provide any information. [75] The reasonable steps requirement creates a no-win situation for the accused. Similarly, when the accused attempted to call the communicant, the officer did not answer. [76] Speaking to the communicant assists in determining the communicant's age, but the police declined to cooperate, almost certainly because engaging in a conversation with the target would betray the sting. An accused who claims he attempted to take a reasonable step by calling the communicant is put in a situation where his motivation is viewed with skepticism, even though the undercover officer is in no position to answer. Applying the standard dictated by the majority, it is impossible for the sting officer to participate meaningfully. [77] The accused cannot attain many of the requirements for reasonable steps set out by the majority because the very nature of the sting will not allow it or the discretionary replies or non-replies of the sting officer may prevent it.

Therefore, what Abella J. stated in dissent was correct: "[t]he result of the reasonable steps requirement in s. 172.1(4), therefore, is to render illusory the accused's ability to allege an honest but mistaken belief in age." [78] A reasonable steps requirement that requires the accused to make communications to ascertain age puts the accused at a "heightened risk of being inculpated [for the] very offence intended to be avoided." [79] The formulation of ss. 4 therefore operates unfairly by inviting a trier of fact to infer guilty intent from the very steps the accused is required to take. The *Morrison* reasonable steps formulation puts the onus on the police to elicit quality evidence that is fair to the accused and makes ***321** his intentions abundantly clear. The fairness and constitutional operation of legislation cannot be left to the discretion and good faith of the police.

(h) A Choate Construction for the Child Luring Offence

(i) It is Impossible to Reasonably Verify the Communicant's Age

When dealing with a communicant by way of telecommunication, there is simply no way for a person to ever truly know who the other person is. No matter what the representation is from the communicant, the communicant could always be underage. If the interaction never leaves the telecommunication sphere, there is no step that an accused could take to ascertain age. Even the restrictive approach to reasonable steps outlined at paras. 105-112 of *Morrison* does not guarantee success. [80] It is not possible to create a list of features that define the differences between a real underage child on the other end of the conversation and an undercover officer posing as one for the simple reason that the undercover could be emulating the language of a young child in the same way that a young child would be saying it.

In the specific context of online communication, Abella J. was correct to conclude that it is impossible to "reasonably verify the communicant was not under the relevant age" and reasonable steps create "a nearly insurmountable barrier to the accused's ability to raise and defend his or her innocent belief." [81] In respect of the ss. 3 analysis, in concluding that "deception and deliberate misrepresentations are commonplace on the Internet," the *Morrison* Court referenced the *Morrison OCA* decision which found there is no expectation that representations made during Internet conversations about sexual matters will be accurate. [82] As Abella J. noted, online identities are all too often artificially constructed or exaggerated, meaning that any message sent to the accused claiming to be of legal age and visual information provided by the communicant, such as profile pictures, photographs and personal identification in the form of drivers licences, health cards, etc., are all unreliable--they could be lies, forgeries, or pertain to someone else. [83]

Apart from the offences at ss. 171.1, 172.1 and 172.2, every other sexual offence with a reasonable steps provision deals with an in-person or face-to-face encounter. When interacting with someone in person, there are many objective indicia available to discern age. [84] The complainant's appearance, behaviour and maturity are but a few. Instead of just reading text on a computer screen, the ***322** accused in these situations is able to see subtleties in the mannerisms of the complainant, hear the maturity of the sound of their voice, the complexity of sentence structure and speech patterns, and observe a whole host of minute tangible factors that give a more accurate picture of the complainant's age. Reasonable steps work well in these contexts, where accused persons have more than ample information and opportunity upon which to draw the correct conclusion. The duty to take reasonable steps is very fair to an accused in those contexts, when so much is at their disposal.

(ii) The Complete Child Luring Offence

Given the inherently inchoate nature of the child luring offence, the "who is" iteration can never truly be a complete offence. Using s. 151 and s. 152 as proxies, two preconditions are essential for a complete offence: (i) the Crown must prove an underage complainant; and (ii) the accused must accept that he interacted sexually with that complainant. When these two conditions are met, the accused may claim an honest but mistaken belief in a legal age. Reasonable steps would then apply to limit the accused's claim of mistake by changing the *mens rea* to a reasonable belief in a mistaken age. [85]

The first precondition is explained by the principle in *Dynar*. A complete offence requires the truth of the attendant circumstance to be proven as true, failing which an inchoate crime may be the only remaining recourse. [86] The second precondition is seminal criminal law: the accused's position dictates the available defences. If the accused takes the position that the complainant was actually of legal age, lying, or not the person he interacted with sexually, reasonable steps have no application. If the accused takes the position that the complainant was indeed underage, he has accepted that evidence, and has no choice but to claim mistake of fact. It is only in this latter situation that reasonable steps should apply.

For a complete "who is" child luring offence, the same preconditions must coexist. The first precondition requires the attendant circumstance of an underage interlocutor be proven true. Without that proof, the prosecution can only be based on the "who the accused believes is" offence.

Satisfying the second precondition is more complicated because, as discussed above, it is impossible to truly know who is on the other end of a conversation occurring through a screen and digital medium. If this premise is accepted, then all child luring cases are *prima facie* inchoate offences because it is not possible for the accused to reasonably ascertain the age of the communicant. Without a way for the accused to reasonably ascertain age, simply proving that the communicant was underage does not align a "who is" child luring offence with the aforementioned proxy examples because the former situation involves a conversation through a screen whereas the latter involves a face-to-face ***323** encounter. However, if the accused and an underage complainant met in person at some point prior to the telecommunications which form the subject of the "who is" offence, the accused would have the same opportunity to discern age as the accused charged with the proxy examples. If the accused takes the position that the communicant with whom he is alleged to have conversed digitally is one and the same as the underage complainant, a choate construction that aligns with the proxy offence is possible.

Consistent with Abella J.'s comments in dissent, the key to constructing a complete "who is" offence child luring is evidence that the accused had the opportunity to reasonably ascertain the age of the communicant based on evidence of a previous face to face

encounter. In this unique situation, the accused is in a position to reasonably discern age, enabling the accused to claim a mistake, making recklessness a sufficient fault element.

5. SECTION 11(D) *CHARTER* ISSUES

(a) The New "Defence" Fails the Inexorable Connection Test

(i) The Defence of Belief That the Other Person Was of Legal Age

According to the *Morrison* framework, ss. 4 converts the accused's denial of *mens rea* (his claim of a legal age belief), into a "defence." [87] Once it has been demonstrated that he did not take reasonable steps, the door to that defence is closed. The judge must also redact from the evidentiary record the accused's claim that he believed the person with whom he was communicating with was of legal age. [88] This construction means that the defence operates as a mandatory, non-rebuttable fact presumption, raising constitutional questions similar to ss. 3. [89]

Before analyzing the reasonable steps issue, the *Morrison* majority settled the issue of fault for the child luring sting offence: only belief or wilful blindness would suffice. [90] Next, they established that the Crown had the onus of proving the accused's underage belief regardless of whether reasonable steps were taken. [91] The majority then went on to create "The Defence of Belief That the Other Person Was of Legal Age." [92] According to their formulation, the defence is available only if there is an air of reality to it, which requires proof of some evidence "capable of amounting to 'reasonable steps"' as defined in paragraphs 105-112. [93] If the air of reality test fails, the trier of law must provide a limiting ***324** instruction to the trier of fact, "that because the accused failed to take reasonable steps to ascertain the other person's age, the trier of fact is precluded, as a matter of law, from considering the defence of honest belief in legal age." [94]

(ii) The Accused's Denial of Guilt Has Been Branded a "Defence"

The first hint that something is awry with this new formulation comes from comparing the descriptions of the "defence" and the Crown's residual onus. The defence is that *the accused believed the communicant was of legal age* and the onus is that the Crown must prove *the accused believed the communicant was not of legal age*. The *mens rea* for the offence itself is *belief that the communicant was not of legal age*. [95] The "defence" is therefore the flipside of the onus and the *mens rea*.

Traditionally, a defence comprises a legal issue or question, usually a justification or excuse, that if resolved in favour of the accused will confer a legal benefit to the accused

that *claims* the defence. It is invariably used to assist the accused to secure an acquittal or to diminish her responsibility for criminal conduct. Framing the "defence" as the negative of the *mens rea* is a distinction without a difference because it nets out to denying the accused his right to deny guilt for the offence charged if the conditions are not met.

(iii) The "Defence" Fails the Inexorable Connection Test

The second hint that something is awry comes at paragraph 121, the tail end of the air of reality test discussion, when Moldaver J. for majority wrote: "Where the accused has failed to point to any steps capable of amounting to reasonable steps in the circumstances, this may be a *good indication* that the accused believed the other person was underage or was wilfully blind as to whether the other person was underage. However, "*even if the defence lacks an air of reality, this is not necessarily determinative of the accused's belief*."[96] In other words, reasonable steps are not determinative of guilt because it is axiomatic that a reasonable steps requirement, which is inherently partly objective,[97] cannot satisfy an entirely subjective fault element like belief. Put another way, when belief is the *mens rea*, it is irrelevant that a reasonable person in the circumstances known to the accused at the time would not have come to a legal age belief because the issue is whether *the particular accused* on trial came to a legal age belief, even if he did not take any steps. Therefore linking the accused's right to deny guilt to a test that does not answer the question of guilt in all cases, violates the very inexorable connection test set out in *Morrison* itself.[98]

***325** The accused's denial of intent in a criminal trial is a gap or weakness in the evidence the Crown must overcome to meet its onus of proof. If reasonable steps do not settle the question of belief, and "the evidence as a whole may leave gaps or weaknesses in the Crown's case that could give rise to a reasonable doubt," to borrow the words of the majority,[99] why should reasonable steps have any role on the question of belief, let alone a role that impedes the accused's task of raising a reasonable doubt by excising his denial of intent? Denying the accused the right to profess innocence based on a test that does not inexorably prove guilt, infringes the presumption of innocence and the right to a fair trial enshrined in s. 11(d) of the *Charter*.[100] The s. 1 *Oakes* analysis done in *Morrison* in respect of ss. 3 would apply with even greater force for this violation because this presumption is not rebuttable,[101] and that the consequence is an excision from the evidence of the accused's claim of innocence, leaving a massive chasm in the evidence for an offence where the ultimate question could be settled by the very evidence that was unconstitutionally excised.

(b) The Air of Reality Test Fails the *Osolin* Test

The Supreme Court of Canada's decision in *Osolin* established that the availability of a defence may be constitutionally limited by an air of reality test, with one crucial caveat: only an evidential burden may be placed on the accused, not a persuasive one. [102] The air of realty test is akin to a *Shephard* test [103] --it is about whether there is some evidence upon which a properly instructed jury could decide the issue. [104] The rigid criteria prescribed at paras. 105-112 does not ***326** appear to be an evidential burden, but a persuasive one. If so, this violates s. 11(d) *Charter* based on the principles in *Osolin*. It is doubtful that this violation could withstand an *Oakes* review since the alternative is to apply the "some evidence" test and have the jury sift through the evidence to decide if reasonable steps were taken.

It could, however, be argued that paragraphs 105-112 of *Morrison* are merely a non-exhaustive guide for the trier of fact to determine if reasonable steps were taken, and not the insertion of a persuasive burden to the air of reality test. This interpretation, should it find favour, is capable of eliminating any *Osolin* concerns regarding the formulation of the air of reality test. There is some support for this interpretation in the last sentence of paragraph 112: "The ultimate question is whether, in the totality of the circumstances, the accused's steps to ascertain the other person's age were sufficient to constitute 'reasonable steps'--namely, those that provide information that is reasonably capable of supporting the accused's belief that the other person was of legal age." If this last sentence refers to the task of the jury in deciding the question of what is a reasonable step, and the evidence that the jury is allowed to ponder is liberally assessed, with the jury being the final arbiter, then the *Osolin* issue is avoided.

6. CONCLUSION

The above discussion has demonstrated that the new *Morrison* reasonable steps formulation is fraught with many legal problems, including serious questions about its constitutionality. The problems emanate from an insistence that the s. 172.1(4) reasonable steps requirement must play a role in the construction of all variations of the offence. The analysis leading to this construction failed to consider the inchoate nature of the child luring offence and the relationship between mistake of fact and reasonable steps. An inchoate offence is only about belief--the truth of a culpable fact is irrelevant to an inchoate offence and never proven in evidence. Reasonable steps were designed to restrain mistake of fact defences in relation to sexual offences where the culpable fact is always proven true. Thus, reasonable steps are inextricably linked to a mistake of fact defence--they demand that a subjective belief in a mistaken fact be objectively based. For the child luring offence, reasonable steps should only apply when a true

underage communicant is proven in evidence, the accused can reasonably verify age, and the accused chooses to defend the charge on the basis that he mistakenly believed the communicant was of legal age. In all other constructions of child luring, reasonable steps should have no application.

Failure to take reasonable steps can only guarantee a fault of recklessness, an inadequate level of fault for an offence requiring belief. Instead of discarding the test altogether, the test was made the arbiter of whether the accused is allowed to profess his innocence at his trial. This goes too far, placing unjustified power in ***327** the hands of a test that is not determinative of guilt. The accused's right to deny guilt at a fair and impartial trial is protected under s. 11(d) of the *Charter*. Denying that right risks convicting an innocent accused. The *Morrison* reasonable steps construction is therefore unconstitutional.

There is no reason to give reasonable steps such prominence and power over the accused's right to fully defend against the charge. Standard jury instructions on assessment of evidence and fundamental principles of criminal law subsume the notion of reasonableness and common sense into the fact finding process. The bread and butter work of judges and juries is to determine intent. There is nothing unique or difficult about figuring out intent for an inchoate child luring offence. Juries and judges must be trusted to do their tasks.

Being a “good indication” of guilt is not an acceptable reason to deny evidence of the accused's claim of innocence because, as the majority admits, failing to take reasonable steps is not determinative of guilt. When this happens, *reasonable doubt will necessarily have to be found on the basis of an unreasonable belief*. The accused's fault, if he is going to be acquitted after failing a reasonable steps inquiry, will be somewhere within that very narrow gap between recklessness and pure belief, just above the former and out of reach of the reasonable steps inquiry and just below belief and out of reach of proof beyond a reasonable doubt. The opening for reasonable doubt is narrow, but it exists. With the stakes so delicate, the accused will need every last shred of helpful evidence at his disposal. Depriving the accused the right to deny guilt on the basis of a test that is essentially irrelevant to the ultimate question, amounts to an excessive encroachment on the accused's s. 11(d) *Charter* rights.

Finally, the decision in *Morrison* has had another unfortunate effect beyond the way it is negatively affecting the rights of an accused charged with child luring. It has opened up debates about and risked spreading the defence-limiting approach to all sexual offences involving underage children, contexts well outside of the inchoate realm of the s. 172.1 child luring offence. This once settled area of the law has suddenly become uncertain because of the implications of following *Morrison*. This has already occurred to some extent in Ontario for the reasonable steps requirements under ss. 150.1(4) as

per the Court of Appeal's decision in *Carbone*. This was an unnecessary detour in the landscape of the fault approach in sexual assault law, one borne solely of the unfortunate formulation in *Morrison*. Another reason to re-craft the *Morrison* formulation is to avoid further encroachments into the fault approach. The British Columbia Court of Appeal in *Angel* declined to implement the *Morrison* defence-limiting approach for the s. 151 offence. Citing Grant & Benedet, they concluded that "more precise reasoning" would be needed by the Supreme Court to reverse the fault based formulation for the s. 151 mistake of age defence. [105] This was the correct choice, especially because the new formulation may eventually have to give way as a result of constitutional concerns.

Footnotes

a1 Written by Salvatore Caramanna with the assistance of Louis Caramanna. Salvatore Caramanna was trial counsel for Mr. Morrison. With co-counsel, he also represented Mr. Morrison on the original constitutional challenges and the appeals. Louis Caramanna is a 2L JD Candidate at Queen's University Faculty of Law.

1 This article will not deal with entrapment issues spawned by the various police sting methods.

2 *R. v. Morrison*, 2019 CSC 15, 2019 SCC 15, 2019 CarswellOnt 3710, 2019 CarswellOnt 3711, [2019] 2 S.C.R. 3, 375 C.C.C. (3d) 153, 52 C.R. (7th) 273 [*Morrison*].

3 See Isabel Grant & Janine Benedet, "Unreasonable Steps: Trying to Make Sense of R. v. Morrison" (2019), 67 CLQ 14 at 2.

4 See *R. v. Morrison*, 2017 ONCA 582, 2017 CarswellOnt 10363, 350 C.C.C. (3d) 161 at paras. 91-103, in particular at para. 95, reversed in part 2019 CSC 15, 2019 SCC 15, 2019 CarswellOnt 3710, 2019 CarswellOnt 3711, [2019] 2 S.C.R. 3, 375 C.C.C. (3d) 153, 52 C.R. (7th) 273 [*Morrison OCA*].

5 See *Morrison*, *supra* note 2 at para. 121.

6 *Ibid.*, at para. 80, footnote 2 (the majority judgment is restricted to s. 7 *Charter* issues only and does not include consideration of s. 11(d) issues, leaving open a future attack based on the latter).

7 See generally *R. v. Carbone*, [2020] O.J. No. 2699 (C.A.) [*Carbone*] at paras. 120-133 (the court used the reshaped *mens rea* analysis effected by *Morrison* to alter the *mens rea* analysis for offences set out in s. 150.1(4)); *Cf R. v. Angel*, [2018] B.C.J. No. 2399 (C.A.) [*Angel*] at para. 51 (the court refused to follow the *Morrison* approach because "[m]ore precise reasoning by the Supreme Court of Canada than exists in *Morrison* is required before it can be extended to the interrelationship of the *mens rea* requirement and mistake of age defence, as they pertain specifically to ... s. 151 ...").

8 See *Morrison OCA*, *supra* note 4 at paras. 95, 102.

9 See Hamish Stewart, "Fault and 'Reasonable Steps': The Troubling Implications of Morrison and Barton" (2019), 24 Can Crim L Rev 379 at 382.

10 See *Morrison*, *supra* note 2 at paras. 83, 129. See also *Carbone, supra* note 7 at para. 101 ("On a plain reading [of s. 172.1], the accused's actual state of mind, that is his "belief the person was under 16", is an essential element of the offence.").

11 See *Morrison*, *supra* note 2 at paras. 101-102.

12 *Ibid.*, at paras. 79-83.

13 *Ibid.*, at paras. 116, 118-122.

14 See *R. v. Osolin*, 1993 CarswellBC 512, 1993 CarswellBC 1274, [1993] 4 S.C.R. 595, 86 C.C.C. (3d) 481, 26 C.R. (4th) 1 [*Osolin*] at paras. 112-114 per McLachlan J.; See also *R. c. Cinous*, 2002 SCC 29, 2002 CarswellQue 261, 2002 CarswellQue 262, [2002] 2 S.C.R. 3, (*sub nom.* R. v. Cinous) 162 C.C.C. (3d) 129, 49 C.R. (5th) 209 [*Cinous*] at paras. 58-91; See also *R. c. Fontaine*, 2004 SCC 27, 2004 CarswellQue 814, 2004 CarswellQue 815, (*sub nom.* R. v. Fontaine) [2004] 1 S.C.R. 702, 183 C.C.C. (3d) 1, 18 C.R. (6th) 203 [*Fontaine*] at paras. 48-61, 64-74.

15 See *Morrison*, *supra* note 2 at paras. 105-112.

16 See *Osolin*, *supra* note 14 at paras. 211-217.

17 See *Morrison*, *supra* note 2 at paras. 127, 132.

18 *Ibid.*, at paras. 83, 129.

19 *Ibid.*, at paras. 101-102.

20 *Ibid.*, at para. 129.

21 *Ibid.*, at paras. 129-130.

22 See Stewart, *supra* note 9 at 382.

23 *Ibid.*, at 380. See also generally *Carbone*, *supra* note 7 at paras. 109-113.

24 See generally *R. v. Darrach*, 1998 CarswellOnt 684, 122 C.C.C. (3d) 225, (*sub nom.* R. v. D. (A.S.)) 13 C.R. (5th) 283 (C.A.) at paras. 88, 90, affirmed 2000 SCC 46, 2000 CarswellOnt 3321, 2000 CarswellOnt 3322, [2000] 2 S.C.R. 443, 148 C.C.C. (3d) 97, 36 C.R. (5th) 223; See also generally *Morrison, supra* note 2 at para. 105; See also generally *Carbone*, *supra* note 7 at paras. 75-76 (accused's belief about the complainant's age is irrelevant to liability for offences identified in s. 150.1(4), absent an appropriate reasonable steps inquiry).

25 See *Carbone*, *supra* note 7 at paras. 122-123.

26 See *Morrison*, *supra* note 2 at para. 101 (the required *mens rea* for sexual assault is established where the accused is reckless with regard to a lack of consent); *Carbone, supra* note 7 at paras. 123-124 (recklessness will suffice to establish the *mens rea* with respect to age in offences involving sexual activity with underage persons); See also *Angel*, *supra* note 7 at para. 44.

27 See *Angel*, *supra* note 7 at para. 45.

28 See *Morrison*, *supra* note 2 at paras. 95-102.

29 *Ibid.*, at para. 209 (subjective *mens rea* may be negated by an honest mistake, while objective *mens rea* may only be negated by an honest *and* reasonable mistake). See also generally Stewart, *supra* note 9 at 398.

30 *Ibid.*, at paras. 90-91, 96, 101.

31 See *R. v. Butler*, 1998 CarswellOnt 544, 13 C.R. (5th) 372 (C.A.) at para. 8 (s. 273.2 does not come into play until it has been proved that the complainant did not consent to the sexual activity); See also *R. v. Park*, 1995 CarswellAlta 221, 1995 CarswellAlta 412, [1995] 2 S.C.R. 836, 99 C.C.C. (3d) 1, 39 C.R. (4th) 287 at para. 16 [*Park*] (in the context of sexual assault, proof of the actus reus includes proof of the fact that the complainant was not, in fact, consenting).

32 See *R. c. Cinous*, 2002 SCC 29, 2002 CarswellQue 261, 2002 CarswellQue 262, [2002] 2 S.C.R. 3, (*sub nom.* R. v. Cinous) 162 C.C.C. (3d) 129, 49 C.R. (5th) 209 at para. 53 [*Cinous*] (in applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true); See also *R. v. Forcillo*, 2016 ONSC 4850, 2016 CarswellOnt 12265 (S.C.J.) at paras. 10-11, affirmed 2018 ONCA 402, 2018 CarswellOnt 6454, 361 C.C.C. (3d) 161, 46 C.R. (7th) 1 at paras. 29-52, leave to appeal refused *James Forcillo v. Her Majesty the Queen*, 2018 CarswellOnt 20646, 2018 CarswellOnt 20647 (S.C.C.) (not an error to prefer both murder and attempt murder in the indictment; the verdicts of not guilty of murder but guilty of attempt murder are neither unreasonable, nor inconsistent).

33 Analogizing the original s. 172.1 offence to sexual interference, the deemed belief in an underage interlocutor acted as a proxy for proof of the culpable fact of an underage complainant at a sexual interference trial. In the same way that proof of the culpable fact for s. 151 is the trigger for reasonable steps in s. 150.1(4) should the accused choose to defend against it, proof of an underage representation combined with the ss. 3 deemed belief, would trigger reasonable steps in ss. 4 should the accused choose to defend against it.

34 See *R. v. Legare*, 2009 SCC 56, 2009 CarswellAlta 1958, 2009 CarswellAlta 1959, [2009] 3 S.C.R. 551, 249 C.C.C. (3d) 129, 70 C.R. (6th) 1 [*Legare*]at paras. 36-38. See also generally *R. v. Dragos*, 2012 ONCA 538, 2012 CarswellOnt 9931, 291 C.C.C. (3d) 350, 95 C.R. (6th) 406 at paras. 29-41.

35 See also *Morrison*, *supra* note 2 at para. 129 where the same point is made.

36 But see *Legare*, *supra* note 34 at paras. 3, 36 (With the constitutional validity of the legislation not in issue, the *Legare* Court eschewed a detailed analysis of a "mistake of fact" defence.)

37 See *R. v. Alicandro*, 2009 ONCA 133, 2009 CarswellOnt 727, 246 C.C.C. (3d) 1, 63 C.R. (6th) 330 at paras. 19-27, leave to appeal refused 2010 CarswellOnt 5358, 2010 CarswellOnt 5359 (S.C.C.) [*Alicandro*]; See also Stewart, *supra* note 9 at 390; See also *R. v. Legare*, *supra* note 34 at paras. 25-24; See also *R. v. Levigne*, 2010 SCC 25, 2010 CarswellAlta 1348, 2010 CarswellAlta 1349, [2010] 2 S.C.R. 3, 257 C.C.C. (3d) 1, 77 C.R. (6th) 1 at paras. 27-28; See also *Morrison*, *supra* note 2 at paras. 40, 200.

38 See *Carbone*, *supra* note 7 at para. 106 (s. 172.1(1) criminalizes conduct that is preliminary to the conduct prohibited by s. 152); See also *Legare*, *supra* note 34 at para. 25; See also *Alicandro*, *ibid.*, at paras. 20-21.

39 *United States v. Dynar*, 1997 CarswellOnt 1981, 1997 CarswellOnt 1982, (*sub nom.* United States of America v. Dynar) [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481, 8 C.R. (5th) 79 [*Dynar*].

40 See *Dynar*, *ibid.*, at paras. 39-41, 47.

41 *Ibid.*, at para. 45.

42 *Ibid.* (this is the necessary conclusion to be drawn given that the court rejected the argument that it was not possible to commit an attempt money laundering prior to the amendment).

43 *Ibid.*, at para. 83.

44 *Ibid.,* at para. 41.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*, at para. 42.

48 *Ibid.*, at para. 47.

49 *Ibid.*, at para. 48.

50 *Ibid.*, at para. 50.

51 *Ibid.*, at paras. 62-64.

52 *Ibid.*, at para. 64.

53 *Ibid.*, at para. 74.

54 *Ibid.*, at para. 70.

55 *Ibid.*, at para. 64.

56 *Ibid.*, at para. 82.

57 See *Morrison*, *supra* note 2 at paras. 95-102. See also *Carbone*, *supra* note 7 at para. 101 ("If the person communicated with was not under 16, s. 172.1(1)(b) requires the Crown to prove the accused "believed the person to be under 16.").

58 See *Morrison*, *supra* note 2 at paras. 55, 81, 85, 95, 101, 102.

59 See generally *Carbone*, *supra* note 7 at paras. 105-115 (The offences involving sexual activity with children are similarly worded. At para. 108: "... nothing in the language of s. 152 speaks to any *mens rea* requirement as it relates to the complainant's age." At para. 113: "... s. 150.1(4) did not overlay a discrete mistaken belief defence on top of a *mens rea* requirement with respect to the age of the complainant. Instead, s. 150.1(4) created a *mens rea* component for offences involving sexual activity with children.")

60 *Ibid.*, at para. 108.

61 *Ibid.*, at para. 113.

62 See generally *R. v. Ancio*, 1984 CarswellOnt 41, 1984 CarswellOnt 799, [1984] 1 S.C.R. 225, 10 C.C.C. (3d) 385, 39 C.R. (3d) 1 at para. 32 (The completed offence of murder involves a killing. The intention to commit the complete offence of murder must therefore include an intention to kill. I find it impossible to conclude that a person may intend to commit the unintentional killings described in ss. 212 and 213 of the *Code*.); See also generally *R. v. Logan*, 1990 CarswellOnt 1002, 1990 CarswellOnt 110, [1990] 2 S.C.R. 731, 58 C.C.C. (3d) 391, 79 C.R. (3d) 169 at paras. 44-45 [*Logan*], per L'Heureux-Dubè concurring in the result.

63 *Ibid.*

64 Stewart, *supra* note 9 at 384.

65 *Ibid.*

66 *Ibid.*

67 See *Morrison*, *supra* note 2 at paras. 209-214.

68 See David H. Doherty, "The Mens Rea of Fraud" (1982-1983), 25 CLQ 348 at 357.

69 See *Morrison*, *supra* note 2 at para. 98.

70 See *Dynar*, *supra* note 39 at para. 41.

71 *Ibid.*, at para. 42.

72 *Ibid.*, at para. 41 ("we cannot be said to 'know' something that is not so").

73 See *Morrison*, *supra* note 2 at paras. 105-112.

74 *Ibid.*, at para. 112.

75 *Ibid.*, at para. 21.

76 *Ibid.*

77 *Ibid.*, at para. 106.

78 *Ibid.*, at para. 223.

79 *Ibid.*, at para. 222.

80 See generally *R. v. Thain*, 2009 ONCA 223, 2009 CarswellOnt 1310 at paras. 33-37 (the reasonableness of the steps taken to ascertain the age of the person must be assessed in the unusual context of internet chat-rooms).

81 See *Morrison*, *supra* note 2 at para. 217.

82 *Ibid.*, at para. 58.

83 *Ibid.*, at paras. 220-221.

84 *Ibid.*, at para. 219.

85 See *Carbone*, *supra* note 7 at para. 108.

86 See *Dynar*, *supra* note 39 at paras. 71-74.

87 See *Morrison*, *supra* note 2 at paras. 80, 103-104.

88 *Ibid.*, at paras. 120, 130.

89 See Stewart, *supra* note 9 at 398.

90 See *Morrison*, *supra* note 2 at paras. 95-102.

91 *Ibid.*, at paras. 96, 121.

92 *Ibid.*, at paras. 103-117.

93 *Ibid.*, at paras. 119-120.

94 *Ibid.*, at paras. 120, 130.

95 *Ibid.*, at paras. 76-80, 96.

96 *Ibid.*, at para. 121 [italics added for emphasis].

97 *Ibid.*, at para. 86; See also *R. v. George*, 2017 CSC 38, 2017 SCC 38, 2017 CarswellSask 328, 2017 CarswellSask 329, [2017] 1 S.C.R. 1021, 349 C.C.C. (3d) 371, 39 C.R. (7th) 1 at para. 8.

98 See Stewart, *supra* note 9 at 398 ("Thus, on the defence-limiting approach, the reasonable steps requirement offends the presumption of innocence for precisely the same reason as s. 172.1(3)."); See generally *Morrison*, *supra* note 2 at paras. 51-62 ("A basic fact presumption will infringe s. 11(*d*) if proof of the basic fact is not capable, *in itself*, of satisfying the trier of fact beyond a reasonable doubt of the presumed fact. (This is another way of articulating the "inexorable connection" test).").

99 See *Morrison*, *supra* note 2 at para. 121.

100 *Ibid.*, at paras. 51-54; See also *R. c. Vaillancourt*, 1987 CarswellQue 18, 1987 CarswellQue 98, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289 at paras. 31-32 (if the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, then the substitution infringes ss. 7 and 11(d) of the *Charter*).

101 See Stewart, *supra* note 9 at 398 ("Even worse, while the presumption in s. 172.1(3) was rebuttable, this presumption is irrebuttable: if the accused did not take reasonable steps, no other evidence can be led or pointed to in support of the claim of mistaken belief.")

102 See *Osolin*, *supra* note 14 at paras. 211-217, in particular para. 211. See also *Fontaine, supra* note 14 at paras. 70 ("With respect to all defences, the evidential burden is discharged if there is some evidence upon which a properly instructed jury acting reasonably could acquit on the basis of that defence: see *Cinous*, *supra* note 14).

103 *United States v. Shephard*, 1976 CarswellNat 1, 1976 CarswellNat 433F, [1977] 2 S.C.R. 1067, (*sub nom.* United States of America v. Sheppard) 30 C.C.C. (2d) 424.

104 See *Fontaine*, *supra* note 14 at para. 74 (as regards all affirmative defences, I think it preferable to say that the evidential burden will be discharged where there is some evidence that puts the defence "in play": see *Cinous*, *supra* note 14 at para. 52).

105 See *Angel*, *supra* note 7 at para. 51.

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