

## THE PREJUDICIAL EFFECTS OF “REASONABLE STEPS” IN ANALYSIS OF *MENS REA* AND SEXUAL CONSENT: TWO SOLUTIONS

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*This article examines the operation of “reasonable steps” as a statutory standard for analysis of the availability of the defence of belief in consent in sexual assault cases and concludes that application of section 273.2(b) of the Criminal Code, as presently worded, often undermines the legal validity and correctness of decisions about whether the accused acted with mens rea, a guilty, blameworthy state of mind. When the conduct of an accused who is alleged to have made a mistake about whether a complainant communicated consent is assessed by the hybrid subjective-objective reasonableness standard prescribed by section 273.2, many decision-makers rely on extra-legal criteria and assumptions grounded in their personal experience and opinion about what is reasonable. In the midst of debate over what the accused knew and what steps were “reasonable,” given what the accused knew, the legal definition of consent in section 273.1 is easily overlooked and decision-makers focus on facts that are legally irrelevant and prejudice rational deliberation. The result is failure to enforce the law. The author proposes: (1) that section 273.2 be amended to reflect the significant developments achieved in sexual consent jurisprudence since enactment of the provision in 1992; and (2) that, in the interim, the judiciary act with resolve to make full and proper use of the statutory and common law tools that are presently available to determine whether the accused acted with mens rea in relation to the absence of sexual consent.*

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## I. INTRODUCTION

This article examines the operation of “reasonable steps” as a statutory legal standard for analysis of the availability of the defence of belief in consent in sexual assault cases and concludes that application of section 273.2(b) of the *Criminal Code*<sup>1</sup> often undermines the reliability and accuracy of decisions about whether the accused acted with *mens rea*, a guilty, blameworthy state of mind. The phenomenon exhibits the classic features of what is known in the law of evidence as “prejudicial effect.”<sup>2</sup> Evidence that is more prejudicial than probative for proof of a material fact is ordinarily excluded by judges to protect the reliability and accuracy of fact-finding and the validity of the legal reasoning process. But the “reasonable steps requirement” *itself* is often interpreted as requiring consideration of evidence that is prejudicial, even substantially prejudicial, rather than probative of the material facts at issue in law. This undermines the validity of legal reasoning and impedes enforcement of sexual assault law. The prejudicial effects in arguments by counsel and judicial deliberation about *mens rea* with respect to affirmative sexual consent include: (1) close attention to factual circumstances that lack probative value in relation to the material facts and are therefore irrelevant; (2) reliance on popular myths, stereotypes, assumptions, and generalizations rather than the legal definition of sexual consent to interpret the significance of the conduct of the parties or the circumstances; and finally, as a direct consequence of the first two, (3) failure to attend to and correctly resolve the essential legal issues. It is ironic that a provision widely hailed by activists as a measure expected to improve the quality of deliberation and decision-making has the opposite effect in many cases or is simply ignored.<sup>3</sup>

As a result, this is a cautionary tale about a law reform initiative that has demonstrably failed to achieve its intended objective. I believe we can learn from the experience. Activists,

<sup>1</sup> RSC 1985, c C-46.

<sup>2</sup> The term “prejudicial effect” is used here as it is in the law of evidence. The leading discussion of the probative value and prejudicial effect of evidence in the context of sexual assault cases remains that in *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577 [*Seaboyer*], holding the sexual history-rape shield provision, then in effect, unconstitutional. In 1992 Parliament enacted new rape shield provisions for sexual history evidence and codified some aspects of substantive sexual assault law including, most significantly, the definition of sexual consent. At present, sexual assault law is a hybrid of common law and statute law. The discussion in *Seaboyer* of the principles governing the exclusion of prejudicial evidence remains authoritative, but references to the Supreme Court’s discussion of hypothetical fact patterns must be updated to reflect sexual assault law as codified and interpreted by the courts since 1991. Reliance on the Supreme Court’s comments about hypotheticals based on outdated law may tacitly reintroduce traditional types and sources of prejudice and thereby undermine and erode the clarity and certainty provided by codification of the definition of sexual consent and subsequent jurisprudence interpreting and applying that definition. I argue that reasonable steps analysis has similar regressive effects.

<sup>3</sup> In 1992, it was widely assumed that section 273.2(b) would preclude many accused from using an “unreasonable” belief in consent to negative *mens rea*. Errors and omissions in judicial interpretations and applications of section 273.2(b) between 1992 and 2012 are reviewed by Elizabeth A Sheehy, “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 483.

legislative drafters, judges, and jurists must scrutinize the probable effects of law reform proposals and restatements of the law closely and skeptically. A clear definition of the legislative objective and full appreciation of how specific legal tools function in practice are both necessary. Any other approach risks failure.<sup>4</sup> It is easy to replicate the very problem a law reform initiative is intended to eliminate. This is particularly true when, as here, both the problem and the proposed solution are based on community norms and attitudes in relation to an issue about which there is widespread controversy and correspondingly limited practical agreement in the community. When the conduct of an accused who is alleged to have made a mistake about whether a complainant communicated “consent” is assessed by a hybrid subjective-objective reasonableness standard, many decision-makers rely on extra-legal criteria and assumptions grounded in their personal experience and opinion about what is reasonable. In the midst of debate over what was “reasonable,” given the accused’s knowledge of the circumstances, the legal definition of consent is easily overlooked. That is precisely what we see here; the result is often failure to enforce the law.

Section 273.2(b) specifies that a defence based on an accused’s belief that the complainant consented is not available to negative *mens rea* if the accused failed to take “reasonable steps” to ascertain consent. But whether the steps were “reasonable” is assessed on the basis of the factual circumstances of which the accused is found beyond a reasonable doubt to have been subjectively aware.<sup>5</sup> Thus, although on its face the provision requires application of a hybrid subjective-objective standard, at its root the standard is a subjective one.<sup>6</sup> Accused persons are inevitably aware of some facts that are legally immaterial to *mens rea* with respect to consent and some decision-makers believe (incorrectly, I argue) that legally immaterial and irrelevant facts of which the accused might have been aware, must be considered in assessing the “reasonableness” of the steps (if any) the accused took, precisely because the accused might have been aware of them.

It is crucial to recognize that “reasonable steps” is an objective standard that reflects community sexual norms. In the context of section 273.2(b), as drafted, “reasonable steps” based on the “circumstances known to the accused” displaces the common law and statutory criteria that otherwise prohibit accused from relying on irrelevant circumstances and extra-legal norms to excuse non-consensual sexual conduct. This prejudices the decision-making

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<sup>4</sup> See Ann Seidman & Robert B Seidman, “Instrumentalism 2.0: Legislative Drafting for Democratic Social Change” (2011) 5:1 *Legisprudence* 95; Svein Eng, “Legislative Inflation and the Quality of Law” in Luc J Wintgens, ed, *Legisprudence: A New Theoretical Approach to Legislation* (Oxford: Hart Publishing, 2002) 65. And on implications for judicial review and monitoring of effects of legislation, see Alexandre Flückiger, “Case-law Sources for Evaluating the Impact of Legislation: An Application of the Precautionary Principle to Fundamental Rights” (2016) 4:2 *Theory & Practice Legislation* 263.

<sup>5</sup> *Criminal Code*, *supra* note 1, s 273.2:  
 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where  
 (a) the accused’s belief arose from the accused’s  
 (i) self-induced intoxication, or  
 (ii) recklessness or wilful blindness; or  
 (b) the accused did not take reasonable steps, *in the circumstances known to the accused at the time*, to ascertain that the complainant was consenting [emphasis added].

<sup>6</sup> *R v Darrach* (1998), 38 OR (3d) 1 (CA). Associate Chief Justice Mordean opines at 24 that notwithstanding s 273.2(b), the offence is still largely one based on subjective fault ... the provision can be regarded as introducing an objective component into the mental element of the offence but it is ... a modified one. It is personalized according to the subjective awareness of the accused at the time. The accused ... is not under an obligation to determine all the relevant circumstances – the issue is what he actually knew, not what he ought to have known.

processes of complainants, police, defence counsel, prosecutors, and judges, rendering the reasonable steps requirement ineffective as a tool to limit availability of the defence of belief in consent. The effects are seen even when the defence of belief in consent is otherwise barred on one or more statutory or common law grounds and is therefore unavailable as a matter of law.<sup>7</sup> “Reasonable steps” thus functions as a legislatively constructed exculpatory “Trojan Horse” that in practice easily overcomes the limits imposed by the legal definition of sexual consent. This is the general mechanism by which section 273.2(b) impedes effective enforcement of sexual assault law. By contrast, application of section 273.2(a) is strictly limited by the legal definition of sexual consent and common law principles of criminal responsibility and therefore does not have this effect.<sup>8</sup>

Analysis of representative cases reveals the reasoning processes that produce these effects. I conclude that section 273.2(b) of the *Criminal Code*: (1) is redundant; even when used properly it adds nothing not already required by or contained in the law; (2) is a source of “mischief” insofar as it makes proof of *mens rea* with respect to consent appear far more complex than it actually is; and (3) as a result, often leads to legal errors and unsound verdicts. Judges who avoid error do so precisely because — to the extent that they use “reasonable steps” analysis, as such, at all — they use it only as a supplementary tool or merely allude to it in passing in the course of a comprehensive analysis of the availability of the defence of belief in consent under sections 19, 265(4), and 273(a) of the *Criminal Code*.

These findings are surprising in view of the enthusiasm with which many jurists, activists, and commentators have promoted the “reasonable steps” requirement, but this also suggests there are some pointed questions that must be asked. Why complicate what is simple if complexity is no longer necessary and invites error? Jurisprudential developments since 1992 with respect to *mens rea* and affirmative sexual consent confirm that accused persons have a legal duty to ascertain consent as defined at common law or in section 273.1 and may not rely on a belief in consent grounded on a private or social definition of consent and related extra-legal criteria to negative *mens rea*. These and related developments address the problem — “unreasonable” beliefs — towards which section 273.2(b) was directed when it was enacted in 1992.<sup>9</sup> As a consequence, it is unclear what purpose, if any, the “reasonable steps” requirement now serves, other than to divert the attention of decision-makers at all levels — complainants, police, prosecutors, judges, and jurors — away from the essential legal issues and to undermine effective enforcement of the sexual assault laws.

In the 1980s, it was widely believed that sexual assailants who held purportedly exculpatory but “unreasonable” beliefs about sexual consent were likely to escape

<sup>7</sup> The defence is unavailable in the *Criminal Code*, *supra* note 1: (1) under section 19 and common law when the belief is based on a mistake of law; (2) under section 273.2(a) and common law when the belief is due to intoxication, recklessness, or wilful blindness; and (3) under section 265(4) and common law when there is insufficient evidence to support a mistake of fact defence that could result in a lawful acquittal by negating *mens rea* with respect to consent.

<sup>8</sup> The effects of the two sections are compared below in detail.

<sup>9</sup> In the early 1990s, “reasonableness” standards were often used by the courts and Parliament to ensure the constitutionality of criminal law provisions in the face of potential challenges under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; see Lucinda Vandervort, “‘Too Young to Sell Me Sex?!’ *Mens Rea*, Mistake of Fact, Reckless Exploitation, and the Underage Sex Worker” (2012) 58:3 & 4 *Crim LQ* 355 [Vandervort, “Too Young”], for discussion of this issue as a factor in drafting the wording of section 273.2(b) in 1992.

prosecution and conviction. Many activists believed legislative reforms were required to bar accused persons from relying on unreasonable beliefs to negative *mens rea*. That view is still widely held. *In truth, however, non-enforcement, both then and now, is largely due to the failure of decision-makers, from police to judges, to make effective use of the legal tools that are available to analyze mens rea in sexual assault cases.* The discussion that follows below identifies these tools and explains how they can be used to bar reliance on “unreasonable” beliefs about consent.

Those who supported enactment of a “reasonable steps” requirement in 1992 as a response to what many believed was a flaw in criminal law<sup>10</sup> or who have advocated strongly in favour of the use of reasonable steps analysis for the same reason, may experience dismay and even cognitive dissonance when confronted with evidence of its prejudicial effects in decision-making in sexual assault cases. The initial impulse may be to discount the evidence presented here as anomalous and insignificant and find my characterization of the root problem as one that arises from legislative design flaws to be completely unpersuasive. That reaction is understandable. But if we are to transform the societal response to sexual violence, we need to be nimble in how we think about sexual assault and the law and be prepared to follow the evidence. Here we have both evidence and arguments based on close analysis of the operation of the reasonable steps provision within its legislative and legal framework. The two, evidence and analysis, working in tandem, the first to illustrate, and the second to discover the mechanisms that produce the resulting mischievous misfeasance, together provide a compelling case for amendment of section 273.2 to codify recent jurisprudential developments that affect its interpretation and application.<sup>11</sup> Pending amendment of the *Criminal Code* by Parliament, the judiciary can and should take prompt and resolute steps to apply sexual assault law properly using the legal tools that are already readily available.

## II. METHODOLOGY

This article is not based on a quantitative empirical study in which all the legal errors in all the reported decisions under section 273.2(b) were identified, classified, and catalogued. That approach was not taken because it would not be useful; it would not isolate and identify the cause of the legal errors made in any given case and therefore could not provide the guidance required to craft a solution. Most errors would likely be attributed to one or more of the frailties to which all legal decision-making is subject and the solution would easily be assumed to lie in more careful legal analysis. Painstaking care in analysis is always desirable but does not and cannot address the specific difficulties at play here. The root cause of the problem does not lie in flaws in interpretation and application of the “reasonable steps” requirement but is more fundamental — the legislative decision to adopt a tool that is not suited to the task at hand. The discovery that a “reasonableness” standard is ill-suited for the

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<sup>10</sup> In his dissent in *Pappajohn v R*, [1980] 2 SCR 120 [*Pappajohn*], Justice Dickson held that, pursuant to principles of criminal law, the defence of mistaken belief in consent may be based on an “unreasonable” belief as long as the belief is honestly held (*ibid* at 152). This view was a source of widespread consternation for many Canadians. Some supporters of the 1992 amendments believed that section 273.2(b) modified the law in a way that would preclude defences based on “unreasonable” beliefs in consent. See Kent Roach, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 174.

<sup>11</sup> An affirmative consent standard has the potential to effect a cultural and behavioural transformation but can only do so if its implementation is not undermined by reliance on the traditional extra-legal assumptions about sexual consent that “reasonableness” entails.

task was not and could never be made by counting and cataloging errors, but only by scrutinizing the fact-finding and legal reasoning processes actually used when the “reasonable steps” requirement is applied.

The approach used here therefore analyzes the mechanics of the operation of section 273.2(b). Working with the elements of fact and law in the contexts provided by specific cases, it is possible to discern not only how and why the reasonable steps requirement invites error, but also how such errors can be avoided by using legal tools that sharply curtail discretion and provide precise guidance which a “reasonableness” standard, as such, cannot offer, especially when it is applied on the basis of the open-ended and subjective “circumstances known to the accused at the time” prescribed by section 273.2(b).<sup>12</sup>

A “reasonableness” standard used in the context of legal regulation of sexual consent has demonstrably regressive effects. This is only to be expected given that traditional extra-legal community beliefs, attitudes, assumptions, and norms lie at the root of both the original problem and the proposed solution. A “reasonableness” standard obfuscates and equivocates, blurring the bright line drawn by the legal requirement of affirmative consent as defined in section 273.1. Indeed, that is precisely what standards are designed to do — to allow the weighing and balancing of a variety of factors in order to assess their combined effect in specific cases. Such an approach is useful in many contexts but is neither appropriate nor workable here.

The question underlying section 273.2, as a whole, is whether an accused’s mistaken belief that valid affirmative consent was being communicated by the other party was a well-grounded belief. If not, reliance on the belief is inculpatory, rather than exculpatory, and therefore the defence of belief in consent is clearly not available to the accused. Reliance on a belief that was mistaken due to impairment, recklessness, or wilful blindness, always entails subjective blameworthiness and culpability, not innocence, and bars the accused from access to the defence. Why forego a simple and clear answer to the question about the availability of a defence that negatives *mens rea* by excusing mistakes, unless the objective is to generate uncertainty rather than certainty, and vagueness and ambiguity rather than clarity? Under current law and jurisprudence, knowledge of the communication of valid affirmative consent and voluntary agreement by the words or conduct of the other party is a classic example of a bright line in the sand. To blur this line by introducing questions about

<sup>12</sup> In *Tele-Mobile Co v Ontario*, 2008 SCC 12, [2008] 1 SCR 305, Justice Abella writing for the majority and discussing the use of “reasonableness” to assess the financial burden imposed by regulatory requirements, states at paras 66–67:

The standard chosen by the legislature — unreasonableness — is a familiar one in law. La Forest J. observed: “‘Reasonable’ is a flexible criterion that permits adjustments to different situations” (*B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 92). And in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, McLachlin C.J., writing for the majority, explained: “The reality is that the term ‘reasonable’ gives varying degrees of guidance, depending upon the statutory and factual context” [paras. 27–28].

In essence, the financial consequences must be so burdensome that it would be unreasonable in the circumstances to expect compliance. This, I readily acknowledge, is a somewhat tautological explanation, but I see no purpose in offering alternative definitions for a term so well known and understood as having a fact-specific compass. *What is reasonable will be informed by a variety of factors*” [emphasis added].

By contrast, affirmative consent provides a precise criterion that eliminates the need for “flexibility.” If it is not “yes,” it is “no.” As the Court in *R v Barton*, 2017 ABCA 216, 354 CCC (3d) 245 [Barton], observed, if you need to know whether someone consents, just “ask” (*Barton*, *ibid* at para 260).

the “reasonableness” of steps taken to ascertain consent can only impede effective enforcement of the sexual assault laws and create uncertainty. Why would we want to do that?

### III. LEGAL FRAMEWORK

Canadian sexual assault law is a hybrid of statutory provisions and common law. *Mens rea*, the subjective culpable awareness required to establish criminal responsibility, is analyzed using fundamental common law principles of criminal responsibility, as interpreted and developed in the jurisprudence. Those principles and the *mens rea* requirements for general intent offences remain largely uncodified. Within the legal framework developed in the jurisprudence, the tools used to analyze *mens rea* with respect to sexual consent include: (1) the definition of “sexual consent” in section 273.1 of the *Criminal Code*, as the communication by words or conduct of the “voluntary agreement of the complainant to engage in the sexual activity in question”;<sup>13</sup> (2) subjective awareness in the form of knowledge, recklessness, or wilful blindness with respect to the facts material to the essential elements of the offence; (3) the general legal duty to comply with the requirements of the law; (4) restriction of the available defences to those for which there is evidence which, if it were found to be reliable and credible by the trier of fact, could be sufficient to result in a lawful acquittal; and (5) the principle that ignorance of the law is not an excuse, codified in section 19 of the *Criminal Code* and developed in legal doctrine whereby a mistake about the law or the legal significance of the facts is not an excuse negating *mens rea* and therefore affords an accused no defence. This latter bar encompasses mistakes with respect to any aspect of the law governing sexual consent, including the legal definition of “consent” and the circumstances under which legally effective consent is not obtained.

The combined legal effect of these tools is clear and, to be blunt, quite simple. If you choose to engage in sexual activity even though you are aware that consent (voluntary agreement to engage with you in the sexual activity in question) has not or may not have been communicated by the words or conduct of the other party, or may not be legally effective due to the other party’s incapacity or some other circumstance in which consent is not “obtained” pursuant to sections 265(3), 273.1(2), or 273.1(3) of the *Criminal Code*, you are acting contrary to your legal duty. In most cases the defence of belief in consent is therefore simply unavailable to you both at common law and pursuant to one or more of the statutory bars in sections 19, 265(4), and 273.2 of the *Criminal Code*, all codifications of common law. Depending on the circumstances, you may be found to have acted with *mens rea* in the form of knowledge, recklessness, wilful blindness, or callous indifference with respect to consent as defined in section 273.1. Under current law, enforcement of the sexual assault laws should therefore be simple and straightforward.<sup>14</sup>

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<sup>13</sup> *Supra* note 1, s 273.1.

<sup>14</sup> For further discussion of the legal framework and related jurisprudential developments, see Lucinda Vandervort, “Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory” (2012) 23:2 *Colum J Gender & L* 395 [Vandervort, “Affirmative Sexual Consent”]. For a further detailed overview of the relevant past and present law, jurisprudence, and emerging issues from a judicial perspective, see below and *Barton, supra* note 12 at paras 238–65.

#### IV. STATUTORY BARS: SECTIONS 19, 265(4), AND 273.2

A statutory bar prohibits the application of a legal provision when specified criteria are met. Section 19, the first clause of section 265(4), and section 273.2 of the *Criminal Code* are all statutory bars. When applied in the context of a sexual assault case, these bars identify circumstances in which the defence of belief in consent is unavailable, but do not codify or otherwise affect the mental element of the offence of sexual assault. These statutory bars promote rational deliberation by prohibiting the trier of fact from considering the defence of belief in consent when the defence could not result in a lawful acquittal.

Section 273.2(a)(ii) simply states the obvious, a simple tautology at common law: the defence of belief in consent is unavailable when the accused is subjectively aware that the other party may not be communicating consent or voluntary agreement to the sexual activity in question.<sup>15</sup> Section 273.2(a)(ii) does not codify the mental element of sexual assault or alter what the Crown must prove to establish *mens rea* in relation to sexual consent. Criminal responsibility or *mens rea* in sexual assault continues to be governed by the common law. Pursuant to section 265(4), the defence of mistaken belief is unavailable, and therefore may not be considered by the trier of fact, whenever the evidence, even if it were believed by the trier of fact, could not result in a lawful acquittal.<sup>16</sup> This is also based on and consistent with common law. Section 273.2 also precludes defences of belief in consent that are based on mere speculation or lack evidentiary support and cannot result in a lawful acquittal.<sup>17</sup> Defences of belief in consent based on mistakes about the law are barred under section 19; again, the defence must be barred because it cannot lead to a lawful acquittal. To permit any defence to be considered by the trier of fact when it cannot lead to a lawful acquittal only

<sup>15</sup> *Criminal Code*, *supra* note 1, s 273.2(a)(ii).

<sup>16</sup> *Ibid*, s 265(4). See e.g. *R v Ewanchuk*, [1999] 1 SCR 330 at para 60 [*Ewanchuk*] where Justice Major stated: “[w]hether the accused took reasonable steps is a question of fact to be determined by the trier of fact only after the air of reality test has been met.” Where there is no evidence that an accused actually took steps to ascertain consent, the analysis proceeds under section 273.2(a)(ii). Under section 273.2(a)(ii), the lack of evidence of steps taken to ascertain consent renders the defence unavailable on the ground that, at common law, belief in consent in such circumstances could only be due to recklessness or wilful blindness. When the defence is not barred under sections 273.2(a)(ii), 265(4), or 19, and is therefore available in law, the trier of fact must consider any evidence of steps taken to ascertain consent, together with the other evidence in the case, and apply the common law principles of criminal responsibility to determine whether the accused acted with culpable awareness or *mens rea* with respect to consent. Early appellate cases like *R v Malcolm*, 2000 MBCA 77, 147 CCC (3d) 34 [*Malcolm*], leave to appeal to SCC refused, 28153 (18 January 2001), construe section 273.2(b) as a substantive defence, whereby taking steps that are “objectively reasonable,” based on the accused’s knowledge of the circumstances, entitles the accused to be acquitted. The influence of *Malcolm* continues, but judicial opinion across the country is mixed and the underlying issues are often not specifically identified: see Vandervort, “Too Young,” *supra* note 9; Vandervort, “Affirmative Sexual Consent,” *supra* note 14; *R v Slater*, 2005 SKCA 87, 201 CCC (3d) 85 [*Slater*]. Hamish C Stewart, *Sexual Offences in Canadian Law* (Toronto: Canada Law Book, 2004) (loose-leaf revision 28), ch 3 at 600.40.40, opines that section 273.2(b) changes the mental element of sexual assault. By contrast see Kent Roach, *Criminal Law*, 6th ed (Toronto: Irwin Law, 2015) who is agnostic on the point, observing that the Supreme Court has not yet construed section 273.2(b) and that

section 273.2(b) can be interpreted as it was by the Ontario Court of Appeal in *Darrach* to stress subjective fault based on what circumstances are actually known to the accused. Such an interpretation might, however, add little to the already existing law that the accused’s mistaken belief in consent is not a valid defence if it is based on wilful blindness (Roach, *ibid* at 457).

<sup>17</sup> This latter view accurately reflects Supreme Court jurisprudence to date, as detailed below. See *Slater*, *ibid*, in which Justice Jackson discusses the slightly more stringent requirement in section 150.1(5) that accused who wish to rely on a defence of mistaken belief about a complainant’s age must take “all reasonable steps” to ascertain the complainant’s age. Justice Jackson asserts: “[s]ection 150.1(5) was added so as to test the foundation of an honest belief, not to impose an additional burden on the Crown” (*ibid* at para 23).



consumes time at trial, confuses the triers of fact, and significantly increases the risk of error and the miscarriage of justice.

Once it is established that the defence of belief in consent is unavailable under sections 19, 265(4), or 273.2(a), analysis of whether the accused took reasonable steps to ascertain consent is redundant and therefore quite unnecessary. That was the case in *R. v. Crangle*,<sup>18</sup> *R. v. Dippel*,<sup>19</sup> *R. v. Flaviano*,<sup>20</sup> *R. v. Alboukhari*,<sup>21</sup> and in *R. v. B.(I.E.)*,<sup>22</sup> discussed below. In all these cases the essential *mens rea* issue was whether the accused was aware that affirmative consent was not or might not be present or legally effective. To ensure that the reader fully appreciates how effectively sections 19, 265(4), and 273.2(a) preclude accused persons from relying on a defence of belief in consent, without the need for any recourse whatsoever to section 273.2(b), it is useful to review the operation of these sections in greater detail.

### A. SECTION 19 AND MISTAKES OF LAW

The defence of belief in consent is unavailable pursuant to section 19 when an accused’s belief in consent is due to a mistake about the law. As *Ewanchuk* affirms, mistakes about the law of consent do not excuse.<sup>23</sup> If an accused believes that a complainant’s boyfriend can consent on behalf of a complainant, that a complainant’s failure to object and resist his or her sexual advances constitutes valid consent, that a complainant who is asleep consents to sexual activity, or that complainants who go camping with friends are in a state of continual consent to sex with anyone, the accused is not “innocent,” but ignorant or mistaken about the law of consent. Such a belief may be “sincere,” that is, what the accused actually does believe, but does not provide the accused with a lawful excuse. In such cases, the defence of belief in consent is not available.

### B. SECTION 265(4) AND SUFFICIENCY OF THE EVIDENCE

A mistake of fact defence is only available to negative *mens rea* with respect to sexual consent when the evidence of a mistake of fact (not law) about the communication of valid consent *could, if believed by the trier of fact*, lead to a lawful acquittal. Otherwise, the defence lacks an “air of reality” and, as a matter of law under section 265(4) and at common law, is unavailable and may not be considered by the trier of fact. For example, persons who are asleep or unconscious may make audible vocal sounds or move their bodies but cannot be said to communicate in any meaningful sense and therefore cannot consent by words or conduct as is required by section 273.1. Such circumstances do not generally provide evidentiary support for a belief in valid consent based on a “mistake of fact” about specific words or conduct that allegedly communicated consent. Belief in consent in such circumstances is ordinarily based on a mistake about the legal significance of the impaired consciousness of the complainant (but see section 19, above), or is due to wilful blindness

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<sup>18</sup> 2010 ONCA 451, 256 CCC (3d) 234 [*Crangle*].

<sup>19</sup> 2011 ABCA 129, 281 CCC (3d) 33 [*Dippel*].

<sup>20</sup> 2013 ABCA 219, 368 DLR (4th) 393 [*Flaviano ABCA*], aff’d 2014 SCC 14, [2014] 1 SCR 270 [*Flaviano SCC*].

<sup>21</sup> 2013 ONCA 581, 310 OAC 305 [*Alboukhari*], rev’g 2010 ONSC 5549, CR-09-45-00 [*Alboukhari Trial*].

<sup>22</sup> 2013 NSCA 98, 300 CCC (3d) 481 [*IEB*].

<sup>23</sup> *Supra* note 16 at para 51.

(see section 273.2(a), below), or both. In such cases, a defence of belief in consent is unavailable in law. When a mistake is alleged solely with respect to the severity of a complainant's impairment, a defence of mistaken belief in consent is barred under section 273.2(a) if the evidence shows that the belief could only have been due to wilful blindness or recklessness.

### C. SECTION 273.2 AND INCULPATORY BELIEFS

Accused who pursue sexual activity without ascertaining that affirmative consent is being communicated violate a legal duty, the duty to ascertain consent. Either there is consent or not. There is no third option. Similarly, if the evidence shows that the accused was aware that the other party was not or might not be communicating valid affirmative consent, the accused is precluded from relying on a defence of belief in consent as a matter of law pursuant to simple logic and section 273.2.<sup>24</sup> A mistaken belief in consent based on inattention, recklessness, or wilful blindness is never an "honest" belief and in each case is inculpatory, not exculpatory.<sup>25</sup>

If the accused was aware the complainant was not communicating valid voluntary agreement to engage in the sexual activity in question with him or her, or was not certain that voluntary agreement or consent was being communicated, the accused's state of mind is one of being aware that consent is or may be absent. *Mens rea* in relation to consent is therefore proven.<sup>26</sup> In these circumstances, "reasonable steps" analysis is a classic "red herring;" it adds nothing, changes nothing, is superfluous, and wastes the court's time. It may also have significant prejudicial effects, confusing the decision-maker, tainting the reasoning process, and resulting in the miscarriage of justice — justice delayed and often denied.

### V. REASONABLE STEPS AND COMMON SENSE<sup>27</sup>

The similarities between the methods used to assess "reasonableness" in law and those used in common sense reasoning explain the ease with which reasonable steps analysis causes mischief and yet simultaneously conceals and thereby exacerbates its effects. In common sense reasoning, decision-makers often speculate about facts, rely on assumptions about people and events, and draw conclusions in the absence of some relevant evidence.

<sup>24</sup> In *Crangle*, *supra* note 18, the trial judge assessed the availability of the defence under *both* sections 273.2 (a) and (b), but need not have done so; either suffices.

<sup>25</sup> See *R v Esau*, [1997] 2 SCR 777 at para 80 and *Ewanchuk*, *supra* note 16 at para 52, where Justices McLachlin (as she was then) and Major, respectively, assert that an "honest" belief is, by definition, never due to wilful blindness or recklessness.

<sup>26</sup> Sexual assault is a general intent offence; proof of specific intent is not required. A minimal intent to touch ("inflict force") with awareness of the material circumstances suffices to prove *mens rea*; in the absence of some evidence to the contrary, awareness of the material circumstances is presumed; the requisite minimal intent may be inferred from the conscious voluntary act itself. *R v Bernard*, [1988] 2 SCR 833 at 863, 878, McIntyre J; 882–83, 887, Wilson J; *Ewanchuk*, *ibid* at para 41.

<sup>27</sup> This section examines uses of the term "common sense" based on the author's experience as an embedded observer of the "everyday life-world" and legal reasoning. See also David Schneiderman, "Common Sense and the Charter" (2009) 45 SCLR 3 ("common sense" often functions by "conferring legitimacy on dominant accounts of the social world" at 14); Donald Braman, "Cultural Cognition and the Reasonable Person" (2010) 14:4 Lewis & Clark L Rev 1455; Karla Maureen O'Regan, *Beyond Illusion: A Juridical Genealogy of Consent in Criminal and Medical Law* (PhD Thesis, London School of Economics and Political Science, 2014) [unpublished] (common sense, legibility and intelligibility, and consent); Patricia Cochran, *Common Sense and Legal Judgment: Community Knowledge, Political Power and Rhetorical Practice* (Montreal: McGill-Queen's University Press, 2017).

Despite those weaknesses, common sense is widely believed to be efficient and generally reliable, moving from impression to hunch or rubric and finally to a resolution, applying and consolidating myriads of lessons based on experience. In the process, perceptions and interpretations of the social significance of factual situations are invariably shaped by beliefs about and attitudes towards the situation and its surrounding circumstances, the social, temporal, and spatial context.

What is taken to be common sense within any social group simultaneously invokes and affirms the cultural perspectives and conceptual frameworks typically used by members of the group to structure and interpret experience. Beliefs, assumptions, and attitudes that are embedded in the shared cultural fabric, shape perception and cognition. When common sense is invoked to justify an assertion or validate an inference about an event or a person, individuals who share the speaker’s general world-view and cultural formation are more likely to conclude that the factual description and the conclusions based on it are, in the circumstances, if not correct, nonetheless plausible, or, at least, completely understandable, legible. Thus unless strict legal constraints are imposed, common sense reasoning easily dominates the decision-making process whenever the question is: “is there any reasonable doubt that a person’s perceptions, beliefs, and actions were reasonable?”

Moreover, in the common law tradition, “reasonableness” is typically left undefined. We assume the “reasonableness” or “unreasonableness” of a person’s action will be self-evident once we know the factual circumstances and social context in which the action was taken. Actions that appear to reflect community norms and common sense reasoning are more likely to be described as “reasonable” than those that do not. But once a decision-maker believes he or she knows the facts, common sense reasoning swings into action; assessment is swift and the conclusion “self-evident.”

The similarities between “common sense” and “reasonableness” affect the operation and effects of laws when: (a) the content of a legal norm is supplied by reference to community norms of conduct or (b) generalizations about human beings and empirical reality that sane and sober members of the community generally believe to be true are used to assess the validity of inferences or conclusions. Moreover, the term “reasonable” is generally used without specifying whether it is used in a normative sense to signal “appropriateness” or in a descriptive evidential sense to indicate there are reasons to believe that a specific state of mind exists or that an inference or conclusion is valid. Yet the decision to use a “reasonableness” standard entails consequences.<sup>28</sup> In particular the effects of “common sense” and “reasonableness” in legal reasoning combined with the inherent ambiguity of the term “reasonable” may easily have quite unintended and counterproductive consequences. The mischief is further exacerbated in the context of decisions about *mens rea* and sexual consent when a flexible “reasonableness” standard is applied on the basis of the

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<sup>28</sup> Common law lawyers may assume that use of a “reasonableness” standard is unavoidable. Not true. Legal tools are chosen. Civil law systems make limited use of “reasonableness” and instead emphasize “legality” and “proportionality.” Systemic differences and emerging points of convergence between common law and civil law within the European Union and in international law are widely debated. See e.g. John Jackson, Máximo Langer & Peter Tillers, eds, *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Oxford: Hart Publishing, 2008); Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini, eds, *Reasonableness and Law* (Dordrecht, Netherlands: Springer, 2009).

“circumstances known to the accused at the time,” an open-ended subjective category that is not constrained by the legal definition of consent.

#### VI. REASONABLE STEPS UNDER SECTION 273.2(B) AND *MENS REA*

When decision-makers treat reasonable steps analysis as a licence to adopt a lay perspective in sexual assault cases and rely on common sense reasoning, the rule of law is easily subverted and legal errors result. This is not surprising. The use of common sense to determine what is “reasonable” encourages speculation about the facts and what the accused knew. Commonly held assumptions and attitudes towards the parties and the factual circumstances that are crucial in common sense reasoning inevitably shape decisions about whether an accused took “reasonable steps” to ascertain consent. Moreover, any reasonable doubt about the accused’s awareness of one or more factual circumstances may in turn be seen to require reasonable doubt about whether the accused can be found to have failed to take reasonable steps under section 273.2(b). These effects are illustrated by the cases analyzed below.

That analysis shows that some decision-makers interpret section 273.2(b) as requiring that the accused’s subjective awareness of the circumstances of the sexual activity be assessed as a social-sexual encounter. The accused’s awareness of the factual circumstances that are legally material to *mens rea* with respect to sexual consent are then easily disregarded. Distracted by questions about the accused’s awareness of the surrounding factual circumstances, including those that were legally irrelevant, the decision-maker may fail to consider the *legal* significance of the accused’s failure to comply with the legal duty to forego sexual activity in the absence of communication by the complainant of voluntary agreement or valid affirmative consent *as defined in law*.

Section 273.2(b) therefore has a strong regressive effect in legal analysis; it encourages decision-makers to ignore the law and instead use private opinions about the extra-legal social significance of the factual circumstances as the normative frame of reference when deciding whether an accused acted with a culpable state of mind. An accused’s perception and interpretation of the factual circumstances may be based on wishful thinking, selective attention, and self-serving beliefs about the complainant and sexual consent that combine fantasy with sexualized gender stereotypes. And under section 273.2(b), it is the accused’s actual knowledge of the factual circumstances that must be assessed to determine whether steps taken, if any, were reasonable. With “the circumstances known to the accused at the time” as the starting point, common sense easily dominates and the decision-maker is more likely to conclude that the accused: (1) may not have been aware of some factual circumstances; (2) therefore may not have failed to take steps to ascertain consent that were “reasonable” given the circumstances known to him or her; and (3) as a result, may well have held what is often described, albeit incorrectly, as an “honest belief in consent.”

The prejudicial effects of this approach are patently invidious in sexual assault cases. When a trial judge uses common sense reasoning to conclude that the defence in consent is not barred under section 273.2(b), the trier of fact, whether judge or jury, may acquit for similar reasons. It is likely that common sense reasoning based on community sexual norms and gender stereotypes is also the basis for many decisions by police and prosecutors not to

charge or prosecute.<sup>29</sup> Reasonable steps analysis, as often practiced, thus allows common sense reasoning and widely held social beliefs and norms to displace the rule of law in the reasoning process in sexual assault cases at each stage of the criminal justice system. The deleterious effects are compounded by the fact that defence counsel and many decision-makers are easily persuaded that application of section 273.2(b) is mandatory *and* that it is a substantive defence, not a statutory bar.

Fortunately, other tools for analysis of culpable awareness are readily available. Accused persons often claim that they failed to take steps to ascertain consent due to a purportedly “innocent” mistaken belief that the complainant was communicating valid consent. But in most cases the defence of belief in consent is barred under section 273.2(a). If you are aware that you do not know whether the other party consents to the activity in question, or whether their consent is capable and legally effective and yet you engage in sexual activity with them, you may be described as indifferent, reckless, or wilfully blind, depending on the circumstances. Each describes a form of culpable awareness; each equally negates an accused’s claim to have “honestly” believed the other party consented.<sup>30</sup> Accordingly, section 273.2(b) does not provide a more rigorous test than those an accused who seeks to rely on a defence of belief in consent must meet under section 273.2(a) or at common law.<sup>31</sup> Reliance on a belief in consent that is not based on awareness of facts that are legally material to the communication of voluntary agreement or affirmative consent is always speculative and inculpatory, not “honest,” and never exculpatory.

## VII. PROBLEMS ARISING FROM IMPLEMENTATION OF SECTION 273.2(B)

In 1992, many activists, academics, and lawyers believed codification of some aspects of sexual assault law would lead to improvements in decision-making with respect to sexual assault cases.<sup>32</sup> Section 273.2, together with the other amendments to the sexual assault provisions enacted in 1992, was expected to lead to improved screening of complaints by police and prosecutors and increased use of legal criteria rather than personal opinion to determine whether the defence of mistaken belief in consent is available in law. One might well assume that, at minimum, section 273.2(b) would remind police investigators, prosecutors, and trial judges that accused who fail to take steps to ascertain that a potential sexual partner consents are prohibited by law from relying on a defence of belief in consent;

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<sup>29</sup> See e.g. comments by Chief Justice McLachlin in *R v Find*, 2001 SCC 32, [2001] 1 SCR 863 at para 103:

These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social “common sense” in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.

<sup>30</sup> See *supra* note 24. This is a crucial jurisprudential development in that it clarifies the legal meaning of “honest” for the purposes of analysis of *mens rea*. When an accused is aware that the other party is not communicating valid contemporaneous consent, failing to take steps to ascertain consent is simply an alternate description of wilful blindness. Neither provides a basis to assert “innocence.”

<sup>31</sup> Indeed, *as often applied*, it provides a less rigorous test than that set by section 273.2(a). See Vandervort, “Too Young,” *supra* note 9.

<sup>32</sup> Sheila McIntyre, “Redefining Reformism: The Consultations that Shaped Bill C-49,” in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293 at 293–326. Bill C-49, *An Act to amend the Criminal Code (trafficking in persons)*, 1st Sess, 38th Parl, 2004–2005 (assented to 25 November 2005), SC 2005, c 43, also contained provisions to regulate the production, admissibility, and use of sexual history evidence at trial.

in other words, that section 273.2(a) and section 273.2(b) should both operate as “statutory bars” to the availability of the defence of belief in consent.<sup>33</sup> The defence should be unavailable whenever the trial judge finds that, in the circumstances proven by the evidence and presumed *in the absence of evidence to the contrary* to be known to the accused, a belief in consent could only have been due to intoxication, recklessness, or wilful blindness. It should be patently obvious that taking no steps to ascertain consent is wilfully blind and reckless at best, not reasonable, unless the complainant communicates affirmative consent under circumstances in which there is no doubt but that valid consent is obtained. These might appear to be obvious and entirely rudimentary propositions, but the case law shows that up to the present, judges, like the accused, police, and prosecutors, often become distracted and entangled in an array of issues related to the ordinary “common sense” significance of the particular circumstances of which the accused actually was aware, *including some that are legally irrelevant to the communication of consent.*

In law, the defence of belief in consent is a mistake of fact defence used to raise a reasonable doubt that the accused was aware that some facts essential for effective sexual consent were absent, or that material facts inconsistent with sexual consent were present, such as when the other party’s agreement to the activity in question was not communicated by words or conduct, might not be voluntary, or that one or more of the factual circumstances in which consent is not “obtained,” as specified in the definition of sexual consent in section 273.1, might be present. If the defence is not barred under section 273.2 and there is some evidence that the accused may have made a mistake about a fact that is material to the presence or absence of the communication of valid consent as defined in section 273.1,<sup>34</sup> the defence may be available, subject to section 265(4). Section 265(4), also a codification of common law, specifies that the defence of belief in consent is only available when there is evidence that, if believed by the trier of fact, would be sufficient to constitute a defence.<sup>35</sup> Availability of the defence under sections 265(4) and 273.2 are both questions of law.<sup>36</sup> Error by the trial judge in interpreting and applying either section is a ground of appeal for the Crown and the accused.

The judiciary has not taken a uniform approach to interpretation and application of section 273.2(b), however. *Some* judges treat the section as a statutory *defence*, rather than a statutory *bar*, and conclude that the accused is entitled to be acquitted if he or she took

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<sup>33</sup> See for example the reasons for judgment in *R v Despina*, 2007 SKCA 119, 228 CCC (3d) 475 [*Despina*], where Justice Jackson analyzes section 273.2 as a statutory bar to availability of the defence, not as a substitute for analysis of *mens rea*. In the opening paragraph of the reasons for judgment, Justice Jackson states: “the trial judge erred in law in leaving the defence of honest but mistaken belief in consent with the jury ... because there was no evidence upon which a reasonable trier of fact could acquit the accused on the basis of the defence *or* the defence was barred by s. 273.2 of the *Criminal Code*” (*ibid* at para 1 [emphasis added]). In the balance of the reasons for judgment in *Despina*, section 273.2 is consistently described as a statutory bar, not a defence, and the availability of the defence of mistaken belief in consent is analyzed within the framework provided by the jurisprudence on *mens rea* and consent. See also *Barton*, *supra* note 12 at paras 250–51 where the Alberta Court of Appeal refers to the provisions in section 273.2 as “statutory bars,” citing *Despina*, *ibid* at para 6; *Dippel*, *supra* note 19 at paras 22–23; *R v Cornejo* (2003), 68 OR (3d) 117 (CA) at para 19.

<sup>34</sup> A mistaken belief about a fact that is immaterial to consent as defined in section 273.1 would be irrelevant. Belief in consent on the basis of such a mistake would be a mistake about the law, affording the accused no defence pursuant to fundamental common law principles and section 19 of the *Criminal Code*, *supra* note 1.

<sup>35</sup> In *R v Osolin*, [1993] 4 SCR 595, Justice Cory states that section 265(4) “simply sets out the basic requirements which are applicable to all defences” (*ibid* at 676).

<sup>36</sup> See *supra* note 14.

“reasonable steps” or is *not* shown to have *failed* to take steps that were “reasonable” in the circumstances of which the accused was aware.<sup>37</sup> These judges do not apply section 273.2(a) to determine whether the defence is nonetheless statutorily barred on the ground that any belief in consent the accused might have had could only have been due to intoxication, recklessness, or wilful blindness. In addition, *some* judges who *do* treat section 273.2(b) as a statutory *bar* may also conclude that an accused who is *not* found to have *failed* to take “reasonable steps” is entitled as a matter of law to raise the defence, also *without analyzing the evidence under section 273.2(a)*. Moreover, reasonable doubt about the accused’s awareness of some of the factual circumstances may *also* be understood to make the defence available to the accused as a matter of law, because without certainty about what the accused was aware of, a judge may conclude that there is no basis on which to decide what steps were “reasonable” within the four corners of section 273.2(b). That approach leaves judges unable, on evidentiary grounds, to conclude that the accused failed to take “reasonable steps” within the meaning of section 273.2(b). Therefore, some of these judges also conclude that the defence of belief in consent must be available for consideration by the trier of fact *without analyzing its availability under section 273.2(a)*.

It has thus become apparent that, unless legal reasoning is constrained by strictly interpreted legal criteria, some judges are likely to continue to conclude that the defence of belief in consent is available when it is not. This is an error of law, potentially resulting in further appeals and legal proceedings extending over a number of years. An acquittal based on an error of law provides the Crown with grounds to appeal. The accused has a further right of appeal if the Crown’s appeal is granted and a verdict of guilty is substituted or a new trial is ordered. Yet in practice, the new trial, if ordered, may or may not proceed; the Crown may simply abandon prosecution of the case. Cases discussed below illustrate that point.

### VIII. ANALYSIS OF REPRESENTATIVE CASES

Comparatively few appeal cases have been decided under section 273.2(b). Nonetheless, analysis of the reasons for decision and judgment in recent trial and appellate decisions demonstrates that section 273.2(b) is analytically redundant and has prejudicial effects in legal reasoning. The use of “reasonable steps” to reanalyze issues already fully addressed by other *Code* provisions may appear innocuous on first examination, but inevitably wastes legal resources and invites error. A provision that confuses and distracts trial judges and appeal court justices and routinely leads to trial and appellate decisions that are incorrect in law, undoubtedly misleads complainants, police, and prosecutors as well.<sup>38</sup> Since the enactment of section 273.2 in 1992, there have been significant developments in the jurisprudence dealing with *mens rea* and consent. Section 273.2 should be amended to incorporate those developments and address the difficulties identified here that arise from implementation of the current section 273.2. The amendments to section 273.2 that are proposed in the conclusion below are designed to achieve both objectives.

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See e.g. *Malcolm*, *supra* note 16, in stark contrast to the approach in *Despins*, *supra* note 33.

For discussion of selected pre-2012 cases, see Sheehy, *supra* note 3. For a brief history of legal developments leading to the 1992 decision to incorporate “reasonable steps” requirements in the sexual assault provisions in the *Criminal Code*, see Vandervort, “Too Young,” *supra* note 9 at 362–68.

Meanwhile, quite independent of whether Parliament amends section 273.2, the judiciary can and must take steps to ensure that verdicts in sexual assault cases are grounded on correct interpretations of the law as it applies to the material facts proven by the evidence, and that tangential issues are not permitted to divert attention from analysis of the essential issues. Trial judges have a duty to instruct themselves and the jury on the law applicable to the evidence, irrespective of the positions adopted by the Crown and the defence.<sup>39</sup> Attempts by defence counsel to persuade the trial judge to put the defence of belief in consent to the trier of fact when, as a matter of law, it is not available on one or more grounds, should be firmly rejected. Trial judges bear the ultimate responsibility for conduct of the proceedings; consultation with counsel during the proceedings does not shift that burden. Trial judges who persistently allow the trier of fact to consider defences that are not available in law should be required to complete judicial education programming or step down from the bench. Similarly, appeal courts should, when justice permits, exercise the full extent of their appellate jurisdiction to vary verdicts and avoid making orders for new trials. This will: (1) expedite cases; (2) discourage counsel from relying on grounds for appeal that could lead, at most, to an order for a new trial (which might never proceed) but not alter the ultimate outcome; (3) conserve legal resources; and (4) result in a final decision at trial in a larger proportion of cases. Reasons for trial decisions and appellate judgments that adhere to this approach — assuming the reasons are written or transcribed and reported — will provide much needed guidance for police, prosecutors, defence counsel, and trial judges. The judiciary can and should exercise a leadership role with respect to interpretation and application of the law and the overall handling and disposition of sexual assault cases — regardless of whether Parliament amends section 273.2. These issues are discussed at greater length below.

**A. “REASONABLE STEPS”  
— A REDUNDANT FORM OF *MENS REA* ANALYSIS**

The cases examined under this heading illustrate the use of section 273.2(b) to provide analysis of the availability of the defence of belief in consent that is merely supplementary. Section 273.2(b) is functionally redundant. In each case, the defence is already barred under sections 19, 265(4) or 273.2(a)(ii); often, all three statutory bars apply.

In *GC*, also known as *Crangle*,<sup>40</sup> the accused sexually assaulted his identical twin brother’s girlfriend when she was asleep alone in the twin brother’s bed. The accused claimed he believed the complainant knew who he was and consented to sexual activity with *him*. The trial judge ruled that the defence of mistaken belief in consent was unavailable and convicted the accused, stating, “[i]t is significant to me that he never went further to make his identity perfectly clear.... Even if I accept all of the evidence of Mr. G.C., he should have done more.”<sup>41</sup> The trial judge continued: “I believe it is open for the court to conclude that the actions of G.C. on the issue of consent were both reckless and wilfully blind and that in

<sup>39</sup> See *R v Bulmer*, [1987] 1 SCR 782 at 789; *R v Pickton*, 2010 SCC 32, [2010] 2 SCR 198 at para 19; and the recent call to action issued to the judiciary by the Alberta Court of Appeal in *Barton*, *supra* note 12 at para 312. Repeatedly asserting the need for updated pattern jury instructions, the Court in *Barton* emphasizes that the judiciary also requires assistance with self-direction in sexual assault cases and must turn its collective collegial attention to revision of pattern instructions.

<sup>40</sup> *Supra* note 18.

<sup>41</sup> *Ibid* at para 11.



any event did not approach reasonable steps in the circumstances known to him at the time.”<sup>42</sup>

The Ontario Court of Appeal upheld the conviction, observing that what is required of an accused depends on the particular circumstances of the case, even to the point of requiring a contemporaneous unequivocal indication of consent from the complainant. In support of this proposition, the Court quoted from the reasons for judgment of the British Columbia Court of Appeal in *R. v. G.(R.)*:

[Section] 273.2(b) clearly creates a proportionate relationship between what will be required in the way of reasonable steps by an accused to ascertain that the complainant was consenting and “the circumstances known to him” at the time. Those circumstances will be as many and as varied as the cases in which the issue can arise, and it seems to me that the section clearly contemplates that there may be cases in which ... nothing short of an unequivocal indication of consent from the complainant, at the time of the alleged offence, will suffice to meet the threshold test which it establishes as a prerequisite to a defence of honest but mistaken belief.<sup>43</sup>

The Court in *Crangle* held that the evidence fully supported the trial judge’s conclusion.<sup>44</sup> Justice Goudge explained that:

Although it was enough for the trial judge to find that any one of the disqualifying circumstances in s. 273.2 existed here, he went on to conclude that ... the appellant proceeded with recklessness and wilful blindness.... Here too, the evidence amply sustained his conclusion that for the appellant to forge ahead in the circumstances was reckless or at the very least displayed a wilful blindness about whether the complainant consented. There is no basis for us to interfere.<sup>45</sup>

The legal effect of the findings of fact was to make the defence unavailable, pursuant to section 273.2(a)(ii), on the ground that in the circumstances belief in consent was reckless or wilfully blind. Sexual assault is a general intent offence. Intent to touch, combined with knowledge, recklessness, or wilful blindness with respect to the absence of communication of consent, constitutes the culpable awareness or *mens rea* required for conviction.<sup>46</sup> Section 273.2(b) adds nothing to the analysis under section 273.2(a). *G.(R.)* and *Crangle* both underscore that ambiguity in communication or with respect to whether the circumstances are ones in which consent is not “obtained” under section 273.1, only proportionately *increases* the care that must be taken to ascertain consent. Ambiguity is *not* a licence to assault; it follows that ambiguity, as such, never gives rise to a defence of belief in consent.<sup>47</sup>

<sup>42</sup> *Ibid.*

<sup>43</sup> (1994), 87 WAC 254 at para 29 [*G(R)*] [emphasis added]. Here “proportionality” is used to assess “reasonableness.”

<sup>44</sup> The Ontario Court of Appeal in *Crangle*, *supra* note 18 summarized key facts the accused knew at para 30:

The appellant knew the complainant had an ongoing consensual sexual relationship with his twin brother, but nothing remotely like that with him. He knew she had gone asleep intoxicated in his brother’s bed, as she had done many times before. The bedroom was pitch dark. Nothing about her conduct that night caused him to think that she would ever consent to sexual intercourse with him.

<sup>45</sup> *Ibid* at para 31.

<sup>46</sup> *Ewanchuk*, *supra* note 16 at paras 41–44.

<sup>47</sup> See generally *Esau*, *supra* note 25 at para 80.

In *Crangle*, the trial judge and the Court of Appeal both used section 273.2(b) in conjunction with section 273.2(a)(ii) and never lost sight of the essential question section 273.2 as a whole is designed to answer — is the defence of belief in consent available in law? Or does the evidence show that the accused was aware that valid and effective affirmative consent had not or might not have been communicated? If so, assertion of a belief in consent under such circumstances only confirms rather than negatives *mens rea*.

In trials by judge alone, the reasons for decision do not always make a clear distinction between analysis under section 265(4), to determine availability of the defence on evidentiary grounds, and analysis under section 273.2(a)(ii) to determine whether belief in consent is unavailable because it could only have been due to recklessness or wilful blindness. This is understandable; the two issues are typically intertwined and the conclusions consistent although the terms in which the analysis is framed are not the same. In the first case, the issue is whether the evidence of the factual circumstances, if believed by the trier of fact, could provide grounds for a defence based on a mistake of fact about the communication, validity, and efficacy of consent or voluntary agreement that could result in a lawful acquittal. In the second case, the issue is whether, given the facts of which the evidence shows the accused was aware, the accused's belief that consent or voluntary agreement had been communicated by the complainant could only have been due to recklessness or wilful blindness. When the fact that the complainant was asleep when the sexual activity commenced is undisputed, there will never be an "air of reality" to the defence. In addition, any alleged belief in consent will always be a mistake of law if the complainant was asleep or unconscious. Thus *Crangle*, in which the availability of the defence was analyzed under section 273.2, could also have been decided under either section 19 or 265(4).

In *Dippel*,<sup>48</sup> yet another a case in which a sleeping complainant was assaulted, the Crown successfully appealed the acquittal. The Alberta Court of Appeal applied the law to the findings of facts at trial, entered a verdict of guilty, and remitted the case to the trial judge for sentencing as authorized by section 686(4)(b)(ii) of the *Criminal Code*.<sup>49</sup> The trial judge had had no difficulty in concluding that the complainant did not consent, but acquitted the accused on the ground that he "may have subjectively believed that the complainant was consenting."<sup>50</sup> The accused's alleged belief in consent was based on the complainant's failure to resist or respond. The issue in the appeal was whether the defence of mistaken belief in consent was available in law.

The Court of Appeal held: "the trial judge erred in her understanding and application of the defence of mistaken belief. *There was no air of reality to this defence and thus no defence to the sexual assault charge.*"<sup>51</sup> The appeal judgment further underscored the right of the complainant "to sleep in an unsecured bedroom without fear of molestation" and that

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<sup>48</sup> *Supra* note 19.

<sup>49</sup> Section 686(4)(b)(ii) provides that on an appeal from a verdict of acquittal rendered by a judge presiding without a jury, the court of appeal may: "enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law" (*Criminal Code*, *supra* note 1, s 686(4)(b)(ii)).

<sup>50</sup> *Dippel*, *supra* note 19 at para 15.

<sup>51</sup> *Ibid* at para 28 [emphasis added].

the respondent accused was under an onus to take “real steps that met the reasonable steps threshold to ensure that the complainant voluntarily agreed to engage in sexual activity with him. He failed to do so.”<sup>52</sup>

The trial judge appears to have decided the case on the facts as she understood their significance from an everyday common sense perspective, disregarding the legal significance of factual circumstances material to the essential elements of consent and *mens rea* and giving the accused the benefit of a mistake of fact defence without considering the substantive and evidentiary legal constraints on the availability of the defence. A similar approach might be used by anyone who is asked to provide an opinion without receiving adequate instruction about the applicable law.

By contrast, the Court of Appeal took a comprehensive approach to *mens rea* and asked whether the legal effect of the findings of fact showed that the accused acted with a culpable state of mind. The Court considered *all* the provisions in the *Criminal Code* that address *mens rea* in sexual assault cases and found the defence to be unavailable under each of them: (1) section 265(4), that, *inter alia*, codifies the long standing common law rule whereby defences are only available if they are supported by evidence which, if found credible by a reasonable trier of fact deliberating judicially, could result in a lawful acquittal (the “air of reality” test); (2) section 273.2(a) and (b), whereby the defence is unavailable whenever the accused’s mistaken belief could, in the circumstances, only be due to intoxication, recklessness, wilful blindness, or failure to take reasonable steps to ascertain consent; and (3) the legal constraints imposed on availability of the defence by the long-standing legal principle, codified in section 19, that ignorance of the law is not an excuse, and related legal doctrine barring accused persons from relying on beliefs based on mistakes of law.<sup>53</sup>

*Dippel* is thus one of a series of cases that ultimately turn on the legal definition of sexual consent. Section 273.1, enacted in 1992, codifies the definition of sexual consent and, for greater certainty, provides a non-exhaustive list of circumstances in which consent is “not

<sup>52</sup> *Ibid* at para 26.

<sup>53</sup> *Ibid* at paras 13–15, 21–25. Ignorance and mistake of law principles were explicitly invoked in analysis of the *actus reus* and *mens rea* with respect to sexual consent in 1999 by Chief Justice Fraser in dissent in the Alberta Court of Appeal in *R v Ewanchuk*, 1998 ABCA 52, 212 AR 81 at paras 91–119 [*Ewanchuk* ABCA]. This approach to analysis of *mens rea* and sexual consent was then adopted and developed by Justice Major in reasons for judgment for the Court on the appeal to the Supreme Court of Canada in *Ewanchuk*, *supra* note 16 at paras 1, 21–22, 51, one of a series of cases in the 1990s in which the Supreme Court affirmed that criminal responsibility for sexual assault is subject to the fundamental legal principles that apply to criminal law generally. Application of the principles of ignorance and mistake of law to analysis of *mens rea* in sexual assault was first proposed in Lucinda Vandervort, “Mistake of Law and Sexual Assault: Consent and *Mens Rea*” (1987–1988) 2:2 CJWL 233, cited in *Ewanchuk* ABCA, *ibid* at para 91. Until Vandervort argued that some mistakes about sexual consent were mistakes of law, all mistakes about sexual consent were characterized as mistakes of fact by judges and academics working in legal systems based on common law traditions. Findings of fact are ordinarily not subject to challenge on appeal, conclusions of law are. The reasons for judgment by Justices McClung and Foisy of the Alberta Court of Appeal in *Ewanchuk*, *ibid*, at paras 1–22 and 23–25, respectively, vehemently affirm both the validity of the historic characterization of mistakes about sexual consent as “questions of fact” and the limits on appellate jurisdiction with respect to conclusions about sexual consent that flow from this characterization, citing the Court’s decision in *R v Weaver* (1990), 80 CR (3d) 396 (Alta CA) as “an example of the reach of this prohibition in these sex/consent cases” at para 1. Vandervort’s position provoked strident debate in some circles from 1985 on; its adoption by Justice Major for the Court in *Ewanchuk*, *ibid*, resolved the issue in Canadian law.

obtained.”<sup>54</sup> *The legal definition of sexual consent, whether defined by statute or common law, imposes strict legal limits on the defence of belief in consent and thereby mandates equally strict analysis of the availability of the defence. Recognition that the legal definition of sexual consent has this pivotal role and these effects is transformative for the handling of sexual assault cases.* For example, any belief in consent that is based on an incorrect legal definition of consent is a mistake of law and is never exculpatory, as a matter of law.<sup>55</sup> Thus, in *Ewanchuk*, Justice Major held that “a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence.”<sup>56</sup> Since its codification in 1992, the definition of consent set out in section 273.1, including circumstances in which consent is not “obtained,” has been further clarified in a series of appeal decisions. In these cases, as in *Dippel*, availability of the defence of belief in consent is typically the issue on appeal, and in each case availability of the defence is strictly limited by the legal definition of consent.

In *Flaviano*,<sup>57</sup> the absence of evidence to support the defence of belief in consent was key, yet again. In brief reasons, the Supreme Court of Canada upheld the 2013 decision of the Alberta Court of Appeal granting the Crown’s appeal, vacating the trial verdict of acquittal, and substituting a conviction for sexual assault based on the findings of fact at trial. A 17-year-old female was home alone when the male landlord, age 43, 6’1” tall, and weighing approximately 250 pounds, entered the home to repair a dishwasher. He repeatedly asked for an escalating series of sexual favours, offering the complainant money and refusing to take “no thanks” for an answer. Fearful and worn down by his persistence, she ultimately complied with a number of his requests.<sup>58</sup>

The Court of Appeal held that the defence of belief in consent lacked evidentiary support and was therefore unavailable. At trial, the accused’s evidence alleging unambiguous consent

<sup>54</sup> *Criminal Code*, *supra* note 1, s 273.1:

- (1) Subject to subsection (2) and subsection 265(3), *consent* means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
- (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
  - (a) the agreement is expressed by the words or conduct of a person other than the complainant;
  - (b) the complainant is incapable of consenting to the activity;
  - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
  - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
  - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
- (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

*Criminal Code*, *ibid.*, s 265(3):

For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

<sup>55</sup> In *Ewanchuk*, *supra* note 16 at para 31, the Supreme Court of Canada also held that there is no defence of “implied consent” under Canadian law — either there is consent or there is not consent.

<sup>56</sup> *Ibid* at para 51.

<sup>57</sup> *Flaviano* SCC, *supra* note 20.

<sup>58</sup> *Flaviano* ABCA, *supra* note 20 at paras 2–17.

had been found to be false. Accordingly, the Court unanimously concluded: “there was no air of reality to the defence of mistaken belief on this record. With respect, it, and the suggestion that the respondent took reasonable steps in the circumstances to ascertain the complainant’s consent, were mere speculation.”<sup>59</sup> Therefore, the only legal issue in the case was whether there was consent, not whether the accused might have mistakenly believed there was consent. In turn, in brief reasons dismissing the appeal, the Supreme Court of Canada observed that “the trial judge erred in law in finding that there was some evidence that [the accused] had taken reasonable steps as required by s. 273.2(b) of the *Criminal Code*.”<sup>60</sup> Neither level of court found the inconsistent statements and errors of law in the reasons for decision by the trial judge to warrant a re-trial. The Crown had proven the elements of the offence at trial; errors of law and errors in applying the law to the findings of material fact at trial (substantiated by the record) could be, and were, corrected by the appeal court.

In both *Dippel* and *Flaviano*, the common law “air of reality” test, codified in section 265(4), is explicitly used to bar the defence of mistaken belief in consent on evidentiary grounds. In the absence of evidence of *any* steps taken to ascertain consent, section 273.2(b) simply does not apply. The same approach could have been taken in *Crangle*. In all three cases, sections 273.2(a)(ii) and (b) are both treated as statutory bars, not substantive defences.

## **B. EVIDENCE THAT “REASONABLE STEPS” ANALYSIS PREJUDICES THE REASONING PROCESS**

Mistakes about facts material to the presence or absence of valid communicated consent are inculpatory when they could only be due to inattention, recklessness, or wilful blindness. Why? An accused is presumed to know the law and is therefore presumed to know that sexual consent is required by law. Accordingly, failure to have been aware of the absence of consent is rarely exculpatory. Failing to be aware of circumstances of a sexual encounter that affect the legal efficacy of communicated consent, including the words, conduct, and capacity of the complainant, is typically due to wilful blindness to facts that are material for the presence or absence of consent — a clear violation of the legal duty to obtain consent.<sup>61</sup> In the absence of evidence to the contrary, persons accused of a general intent offences are presumed to be conscious and to be aware of the factual circumstances of their actions, just as they are presumed to act voluntarily. Accordingly, although the facts material to the elements of the offence must be proven by the evidence in the case, the Crown is not required to adduce affirmative proof that an accused was aware of the circumstances of the alleged offence, unless there is some evidence that could raise a reasonable doubt on this issue. Trial judges who ignore the legal presumption that an accused was conscious and aware of the material facts are more likely to interpret section 273.2 in a manner that permits accused to rely on the defence of belief in consent when it is not actually available in law. This is an error of law and grounds for an appeal on a question of law. Failure to appeal acquittals or orders for new trials that are based on such errors of law allows custom and extra-legal assumptions and beliefs to defeat the rule of law. That remains a significant

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<sup>59</sup> *Ibid* at para 50.

<sup>60</sup> *Flaviano* SCC, *supra* note 20 at para 1.

<sup>61</sup> *Esau*, *supra* note 25 at para 70.

problem for effective enforcement of sexual assault law and is only exacerbated by reasonable steps analysis under section 273.2(b).

Judgments in two appeals decided in Ontario and Nova Scotia in 2013 provide striking recent illustrations of the prejudicial effects of “reasonable steps” analysis. The Ontario case is *Alboukhari*.<sup>62</sup> The Nova Scotia case is *IEB*.<sup>63</sup> These cases demonstrate that judges may become so preoccupied with the nuances of “reasonable steps” analysis that they disregard the legal significance of evidence of facts material to the essential elements of the offence.<sup>64</sup> The mischief caused by “reasonable steps” analysis in these cases is apparent and is compounded by the assumption that section 273.2(b) is a substantive defence rather than a statutory bar. In these cases, appellate judges allowed “reasonable steps” analysis to complicate what were actually simple cases. Significant legal resources were deployed to conduct, decide, and appeal these cases, but the net effect in both was arguably justice denied.

Members of the judiciary are responsible for the conduct of the judicial process and should re-examine the approaches they take in sexual assault cases. Proper weight must be attached to the legal significance of the material facts proven in evidence at trial and, when possible, appeal cases should be disposed of by a final verdict, not an order for a new trial. Counsel who present defences that are patently unavailable in law on the facts in evidence should be asked to move on or sit down. When the judiciary fails to exercise the full extent of its jurisdiction to ensure that cases are resolved correctly and with finality whenever possible, justice is delayed and denied, the rule of law and the integrity and reputation of the administration of justice are undermined, and scarce legal resources are wasted. The judiciary has a duty to take steps to address these matters. Wilful blindness to the consequences of questionable conduct is not an option; it causes significant individual and collective societal harm, directly and indirectly. This is apparent with respect to the handling of many sexual assault cases by the criminal justice system. *Alboukhari* and *IEB* illustrate the problem.

In *Alboukhari*,<sup>65</sup> the Ontario Court of Appeal granted the accused’s appeal and ordered a new trial on the ground that the trial judge misapprehended the evidence on several issues central to his reasoning process, resulting in a miscarriage of justice. The Crown did not seek leave to appeal and abandoned further prosecution of the case.

The case involved four men in their 20s and three women, ages 18 and 19, on a camping trip. On the first evening, the complainant consumed alcohol, became ill, vomited, and went to sleep alone in her boyfriend’s tent. The accused later entered the tent, uninvited, after the complainant’s boyfriend suggested to the accused that the accused have sex with her. The complainant testified that when she was awakened by the accused’s attempts to penetrate her sexually she believed the accused was her boyfriend; when she subsequently realized he was

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<sup>62</sup> *Supra* note 21.

<sup>63</sup> *Supra* note 22.

<sup>64</sup> The legal proceedings in *R v George*, 2016 SKCA 155, 344 CCC (3d) 543 [*George* SKCA], rev’d 2017 SCC 38, [2017] 1 SCR 1021 [*George* SCC] not discussed in detail here, arguably further illustrate the extent to which “reasonable steps” analysis can be strategically used to divert attention away from issues that are fundamental to the correct analysis of criminal liability.

<sup>65</sup> *Supra* note 21.

not, she immediately pushed him away and stumbled out of the tent.<sup>66</sup> The trial judge found that the complainant did not consent to sexual activity with the accused. That finding was not disputed in the appeal. The trial judge examined the application of section 273.2(b) in detail and ultimately concluded that the defence of belief in consent was not available, finding that the accused failed to take steps to ascertain whether the complainant was aware of his identity when she was roused from sleep by his sexual advances and engaged in sexual activity with him in the tent.<sup>67</sup>

Given that the issue disputed at trial was availability of the defence of belief in consent, it is remarkable that the appeal was not decided under section 265(4) and section 19, as in *Ewanchuk*, or section 273.2, as in *Crangle*, or with reference to all three, as in *Dippel*. Once the defence is barred under any of these provisions, whether the accused took “reasonable steps” to ascertain consent is moot. As Justice Epstein herself stated towards the end of her reasons for judgment on the appeal: “I observe that the trial judge’s finding that the appellant initiated sexual contact while the complainant was still asleep is potentially significant as, by itself, it would support a conviction for sexual assault. However, for unknown reasons, this point was not argued at trial or on appeal.”<sup>68</sup> It is not surprising that the defence arguments focused on the reasonable steps requirement, not on the fact that the complainant was asleep when she was assaulted! The Court of Appeal, in turn, also focused on section 273.2(b) and held that the trial judge’s reasoning process in applying section 273.2(b) was undermined by misapprehension of the evidence on key issues, resulting in “various errors” and, ultimately, a miscarriage of justice. Rather than simply dismissing the appeal on the ground that the Crown had proven all essential elements of the offence at trial and there was no miscarriage of justice, the Court granted the appeal and ordered a new trial.<sup>69</sup>

The trial judge had assessed the reliability and credibility of all five witnesses’ testimony and determined the weight and significance to be attached to their evidence. The findings of fact were based on detailed analysis of the evidence. The errors the trial judge was alleged to have made were all with respect to peripheral facts, not to material facts, and some were arguably not even “errors.”<sup>70</sup> Errors with respect to questions that are moot or peripheral do not necessarily affect the reasoning process with respect to the material issues and therefore cannot be said to result in a miscarriage of justice unless they taint the credibility findings in a material respect. Justice Epstein may have concluded the latter was the case, although this is neither clearly stated nor beyond challenge.

The trial judge found that the accused initiated sexual activity with the complainant when she was sleep and that he was liable to be convicted. That the complainant was asleep when the accused initiated sexual activity was not disputed. Persons who are asleep cannot consent

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<sup>66</sup> *Alboukhari*, *supra* note 21 at paras 3–8.

<sup>67</sup> *Ibid* at paras 15–23. Initiation of sexual contact with anyone who has not communicated valid affirmative consent is either sexual assault or attempted sexual assault.

<sup>68</sup> *Ibid* at para 77; this finding of fact supports the guilty verdict at trial.

<sup>69</sup> *Ibid* at paras 78–82.

<sup>70</sup> *Ibid* at paras 53–62. For example, rejecting the trial judge’s conclusion that it was “pitch black” in the tent when the assault commenced, Justice Epstein noted that the witnesses testified about what they could see as they stood inside the open tent immediately after the assault with light from the dying campfire and the moon on 21 June, the summer solstice. The fact that there is far less, if any, light inside a closed tent is not mentioned. Experienced tent campers are familiar with this phenomenon.

to sexual activity.<sup>71</sup> Under those circumstances, the identity of the assailant is immaterial in law. It was open to the Court of Appeal to dismiss the accused's appeal on the ground that the stringent standard required to find a miscarriage of justice was not met and a correct interpretation and application of the law to the material facts as found at trial required conviction. Inconsistent statements and errors of law by the trial judge do not always make a new trial necessary.<sup>72</sup> The crucial question is whether the essential elements of the offence were proven at trial. I suggest that the Court of Appeal should have dismissed the appeal, corrected any errors of law, applied the law to the findings of material fact at trial substantiated by the record, and upheld the conviction.

It is apparent, however, that the Court viewed section 273.2(b) as a substantive defence. Indeed, unless this assumption is made, the approach taken in the reasons for judgment on the appeal in *Alboukhari* is quite odd. But when section 273.2(b) is construed as a substantive defence — as in *Malcolm*,<sup>73</sup> cited with approval by the appeal court in *Alboukhari* — an accused who is not found beyond a reasonable doubt to have failed to take steps that were, given his or her knowledge of the circumstances, objectively reasonable, is viewed as entitled to an acquittal. Thus, reasonable doubt about what an accused knew precludes finding that the accused failed to take reasonable steps and, in turn, permits the accused to rely on the defence of belief in consent and claim the right to be acquitted.<sup>74</sup> Defence counsel who adopt this interpretation of section 273.2(b) focus attention on the nuances of the accused's awareness of the overall circumstances, not merely those material to communication of consent. Doubt about what the accused knew about any of those circumstances is used to raise doubt about whether the accused's steps, if any, were "reasonable" given what he knew. Any reasonable doubt must be construed in favour of the accused. The impact of this approach can be seen throughout the reasons for the appeal judgment.

<sup>71</sup> *R v JA*, 2011 SCC 28, [2011] 2 SCR 440 at paras 36, 42 (sleep deprives a complainant of the opportunity to make a conscious decision to engage in the sexual activity in question).

<sup>72</sup> See e.g. *Ewanchuk*, *supra* note 16; *Dippel*, *supra* note 19; *Flaviano ABCA*, *supra* note 20.

<sup>73</sup> *Supra* note 16 at para 24. In *Alboukhari*, *supra* note 21 at paras 41–42 Justice Epstein states:

In *Malcolm*, the court set out a useful approach to the determination, as follows, at para. 24:

First, the circumstances known to the accused must be ascertained. Then, the issue which arises is, if a reasonable man was aware of the same circumstances, would he take further steps before proceeding with the sexual activity? If the answer is yes, and the accused has not taken further steps, then the accused is not entitled to the defence of honest belief in consent. If the answer is no, or even maybe, then the accused would not be required to take further steps and the defence will apply.

Thus, while reasonable steps are assessed from an objective point of view, this assessment is informed by the circumstances subjectively known to the accused. The accused is not under a positive obligation to determine all of the relevant circumstances; rather, the assessment is based on the circumstances actually known to him or her at the time: *R. v Darrach*, (1998), 38 O.R. (3d) 1 (C.A.), at p. 89 *aff'd* on other grounds, 2000 SCC 46, [2000] 2 S.C.R. 443.

This assertion is arguably overstated and reliance on this passage from the reasons in *Darrach* inappropriate. Communication of consent is not merely a "relevant circumstance" but is instead material. Accused persons are, most definitely, subject to a legal duty, that is a positive obligation, to ascertain consent. Accused who are inattentive to circumstances that render communicated consent inoperative are liable to be found to be wilfully blind or reckless. The jurisprudence on sexual consent and *mens rea* has moved on since *Darrach* was decided in 1998.

<sup>74</sup> *Alboukhari*, *ibid* at para 43, Justice Epstein notes that in some circumstances unequivocal consent is required, but then proceeds to explain that: "[t]he accused's mistaken belief in consent need not be reasonable in order for the defence to be available. As Morden A.C.J.O. stated in *Darrach*, at p. 90, '[w]ere 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'" (*ibid* at para 44).



Ironically, that interpretation of section 273.2(b) threatens to take sexual assault law back to the 1970s and 1980s, when mistake of fact defences dominated the discourse and were widely believed to be the sexual predator’s best friend, despite Justice Dickson’s assurances to the contrary in *Pappajohn*.<sup>75</sup> But that interpretation is arguably incorrect and is not uniformly followed by appeal courts across Canada at present.<sup>76</sup> Nonetheless, the appeal court in *Alboukhari* explicitly adopted the *Malcolm* approach whereby “the starting point of the reasonable steps analysis is the circumstances known to the accused.”<sup>77</sup> The Court reviewed the findings of fact at trial and concluded that the trial judge erroneously omitted consideration of “physical differences” between the accused and the complainant’s boyfriend that “could have been detected regardless of the visibility in the tent.”<sup>78</sup> Here the Court referred to differences in weight, build, and hair, suggesting these would have been obvious to the complainant, even in the dark, *due to intimate physical contact with the accused*. This line of reasoning suggests the accused was entitled to believe the complainant knew (once intimate contact, that is, the assault, was in progress) that he was not her boyfriend because the accused weighed less, was more slender, and had more hair. The reasons for judgment neither acknowledge that this line of reasoning is in play nor that it assumes the accused was entitled to believe the complainant was in a *continuous state of consent to sex with anyone and everyone until, she withdrew her consent*. Such a belief would be a mistake about the law of consent. Nonetheless, this is one of the grounds the Court of Appeal relied on to conclude that the trial judge’s analysis was unsound, that the analogy he made to the facts in *Crangle* was incorrect, and that “the conviction cannot be trusted as it is not based exclusively on the evidence.”<sup>79</sup>

Yet, Justice Epstein also stated: “[t]he trial judge, accepting S.R.’s testimony that she was awakened to find a man attempting to vaginally penetrate her, found that it was the appellant who initiated sexual contact.”<sup>80</sup> That finding would have been sufficient to decide the matter at trial, with recourse to the defence of mistaken belief in consent barred under sections 19, 265(4), and 273.2(a)(ii). Nonetheless, the trial judge proceeded to consider, at length, application of section 273.2(b) based on the sequence of events that transpired over a period

<sup>75</sup> *Supra* note 10. Justice Dickson expressed confidence in the ability of Canadian juries to see a “cock and bull” story for what it is, stating: “[t]he reasonableness, or otherwise, of the accused’s belief is only evidence for, or against, the view that the belief was actually held. . . . Canadian juries, in my experience, display a high degree of common sense, and an uncanny ability to distinguish between the genuine and the specious” (*ibid* at 156). There “common sense” is invoked to signal that the problem of “unreasonableness” is not of major practical significance. The circularity of arguments bottomed on common sense and shared perspectives and assumptions is clearly at work here. In the period of 1980–1992, gender perspective and gendered experience strongly influenced whether one shared Justice Dickson’s sanguine views. Then, as now, common sense was not “common.”

<sup>76</sup> See generally *supra* notes 14, 16, 18, 33, 36, 39–40, 64, and also notes 78, 115, 119 and accompanying text below, on the significance of the distinction between statutory bars and statutory defences.

<sup>77</sup> *Alboukhari*, *supra* note 21 at para 79. Justice Epstein, like Justice Helper in *Malcolm*, *supra* note 16, construed section 273.2(b) as a substantive defence rather than a statutory bar. This explains why she viewed the accused’s knowledge of peripheral facts as crucial and ordered a new trial.

<sup>78</sup> *Alboukhari*, *ibid*.

<sup>79</sup> *Ibid* at para 81. This passage is unclear. In what respect the circumstances known to the accused in *Crangle* and *Alboukhari* are materially different at the time each initiated the sexual contact in question is not explained. One accused was the identical twin of the complainant’s boyfriend and the other was not; that difference is surely immaterial to the analogy drawn by the trial judge! There is a crucial similarity however. Neither accused obtained consent nor had any legally relevant reason whatsoever to believe the complainant was communicating consent to sexual activity with anyone when he initiated the activity. Sleeping women cannot communicate. Whether it was “pitch-black” and whether there were perceptible physical differences between the accused and the boyfriend was irrelevant in the circumstances.

<sup>80</sup> *Ibid* at para 20.

of about twenty minutes *after* the accused entered the tent and initiated sex with the intoxicated complainant *when she was asleep*. In turn, Justice Epstein, rather than dismissing the appeal on the ground that all the essential elements of the offence of sexual assault were proven by the Crown at trial, focused her attention on the portions of the reasons for decision at trial that deal with section 273.2(b).

As in *Crangle*, the trial judge in *Alboukhari* had ample reason, given the facts as found, to conclude that the defence of belief in consent was not available under section 19, 265(4), or 273.2(a)(ii). Doubt about *Alboukhari*'s awareness of subsequent events and immaterial facts could not alter that conclusion. No steps are not "reasonable" steps if you know that the complainant is asleep and therefore not capable of communicating consent. Furthermore, no steps, when you know that the complainant barely knows you, has been drinking heavily, and is asleep in a private enclosed space, are not only not "reasonable steps" but arguably demonstrate either callous indifference, recklessness, or wilful blindness towards consent or a complete misapprehension of the legal definition of consent.

Yet the Court of Appeal treated section 273.2(b) as if it were a substantive defence, and focused on tangential questions such as exactly how dark it was in the tent when the accused initiated sexual intercourse with the sleeping complainant. This approach is only intelligible if section 273.2(b) is a substantive defence that has priority over both the legal duty to obtain voluntary agreement to the sexual activity in question and the legal effect of section 273.2(a) on availability of the defence. That interpretation of section 273.2(b) is incorrect; it is based on fundamental error, a misreading of the subsection within the framework of the assault and sexual assault provisions as a whole.

The trial judge in *Alboukhari* avoided that error and, in the end, convicted the accused of sexual assault contrary to section 271 of the *Criminal Code* "as a result of his failure to determine whether or not the complainant ... was consenting to having sexual relations with him."<sup>81</sup> As in *Crangle*, the accused had no legally valid reason to believe that the complainant agreed to engage in sexual activity with *him*. Moreover, failure to ascertain consent *prior* to initiating sexual activity always constitutes an offence. The conviction was not a "miscarriage of justice." The appeal should have been dismissed.

The reasons for judgment in *Alboukhari* illustrate the prejudicial effect of "reasonable steps" analysis in the reasoning process. Sexual assaults committed against sleeping complainants are all too common and should be easy to prosecute, as the appeal Court suggests.<sup>82</sup> Given that reality, judgments like that in *Alboukhari* are a gift, a true boon, to sexual predators. Left unchallenged, such decisions are apt to deter prosecution in many cases by encouraging police, prosecutors, and defence counsel to treat section 273.2(b) as a substantive defence and focus on tangential aspects of an accused's knowledge of the factual circumstances of the alleged offence as potential grounds for doubt. Following *Alboukhari*, questions about the factual circumstances, including those *subsequent to initiation of the assault*, are likely to be seized on by the defence and used strategically, in conjunction with section 273.2(b), to confuse the trial judge and the trier of fact and

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<sup>81</sup> *Alboukhari* Trial, *supra* note 21 at para 168.

<sup>82</sup> *Alboukhari*, *supra* note 21 at para 77. These cases are most likely to result in charges and proceed to trial when there is no factual dispute over whether the complainant was asleep when the assault commenced.

prejudice the reasoning processes used to arrive at a verdict. The circumstances surrounding an assault should be considered at sentencing, but trial judges would be well advised to decide whether *the defence of belief in consent is available with respect to the time when sexual contact was initiated* as a question of law under sections 19, 265(4), and 273.2(a).<sup>83</sup>

In short, in *Alboukhari* the Ontario Court of Appeal was drawn into error by “reasonable steps” analysis, making what was material and simple in law appear complex and uncertain. In the appeal, defence counsel conceded that the *actus reus* had been proven at trial. The absence of consent was not in dispute. The trial judge’s alleged misapprehension of some of the evidence could not affect reasoning about the *mens rea* issues that were essential for conviction. The tests in *R. v. Morrissey*<sup>84</sup> and *R. v. Lohrer*<sup>85</sup> were not met. The appeal should have been dismissed. Correct application of the law to the material findings of fact, substantiated by the evidence in the record, required conviction; in the absence of a miscarriage of justice, the appeal court lacked jurisdiction to interfere with the trial verdict in any event.<sup>86</sup>

Section 273.2(b) creates a significant risk that reasoning about *mens rea* and the availability of the defence of belief in consent will be tainted, as seen in *Alboukhari*, by speculation about whether the accused was aware of facts *other than* those material to communication of valid consent. Absent knowledge of the communication of valid voluntary agreement to the activity in question, sexual activity of any type is an offence. “Sans oui, c’est non!” Why complicate what is simple? In my opinion, the spectacle of members of the judiciary being diverted by section 273.2(b) into extended examination of questions that are, strictly speaking, moot insofar as they are governed as a matter of law by sections 19, 265(4), and 273.2(a), constitutes ample reason to amend section 273.2(b).

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<sup>83</sup> Brief reasons in *Flaviano* SCC, *supra* note 20, underscore that section 273.2(b) has no application where there is no evidence that the accused took reasonable steps. In the absence of evidence sufficient to make the defence of mistaken belief in consent available in law on the ground that it actually *could* result in a *lawful* acquittal (see sections 265(4) and 19), reliance on section 273.2(b) creates a significant risk that legally irrelevant evidence will be assumed to be probative and given significance and weight.

<sup>84</sup> (1995), 22 OR (3d) 514 (CA).

<sup>85</sup> 2004 SCC 80, [2004] 3 SCR 732 [*Lohrer*]. Justice Binnie described the *Morrissey* standard as “stringent” and at para 2 stated:

The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but “in the reasoning process resulting in a conviction.”

In *Alboukhari*, *supra* note 21, the reasoning process required to affirm the conviction was not dependent on the peripheral circumstances canvassed in detail by the Court of Appeal unless section 273.2(b) is viewed as a substantive defence.

<sup>86</sup> Where, by contrast, the question relates to a court of appeal’s jurisdiction on an appeal from a verdict of acquittal, see discussion in *Ewanchuk*, *supra* note 16 at paras 21–22, in *IEB*, *supra* note 22, detailed below; in the dissenting reasons for judgment by Justice Jackson in *George SKCA*, *supra* note 64 at paras 52–100; and in the reasons for judgment by Justice Gascon for a unanimous Court granting George’s appeal against the order for a new trial and restoring the trial acquittals (*George* SCC, *supra* note 64 at paras 27–29).

C. EXERCISE OF APPELLATE JURISDICTION  
— THE NEED FOR JUDICIAL RESOLVE

*IEB*<sup>87</sup> exemplifies a lack of appellate resolve in analyzing *mens rea* with respect to consent; the result is justice delayed and denied. The charge arose during a party at a tavern to celebrate various events, including the complainant's acceptance into the army. She testified that everyone at the party was drinking, she was drunk, and the accused — the boyfriend of one of her close friends — was a "friend" whom she trusted.<sup>88</sup> When the accused asked her to follow him outside, she assumed he intended to tell her she was drunk and should go home.<sup>89</sup> Instead he led her behind a nearby dumpster, immediately exposed his penis, asked her whether it was "big," and then grabbed her hair and pulled her head to his groin area. Without words being spoken by either of them with respect to consent, he pushed his penis into her mouth. The complainant testified that the accused ejaculated and then pulled up his pants, saying "none of this ever happened, Corporal," and walked away, leaving her standing there.<sup>90</sup> When asked at trial whether she "consented," the complainant testified that she said neither "yes" nor "no," but was crying. The complainant explained that she had not done or said anything indicating refusal because she was in shock and immediately thereafter was gagged by the accused's penis. The trial judge found that the complainant did not consent, but entered an acquittal on the ground that the accused might have believed she consented.

The Crown appealed, alleging that the trial judge erred in law and requesting that a conviction be entered pursuant to section 686(4)(b)(ii).<sup>91</sup> The Court granted the appeal but declined to enter a verdict of guilty and ordered a new trial stating: "[w]hether or not the respondent had the requisite *mens rea* for sexual assault is a fact that remains to be determined."<sup>92</sup> That conclusion was based on an error of law. A verdict of guilty based on the findings of fact at trial could and should have been entered. Instead, the Court left the parties and the public with the impression that the accused might have had a viable defence in law on these facts. This does not advance either public or professional knowledge or understanding of the law of sexual assault. In view of the findings of fact at trial, the accused was liable to be convicted. The *actus reus*, including the absence of consent by the complainant, was established at trial beyond a reasonable doubt; the trial judge described the accused as intending to perform the acts that constituted the physical aspects of the *actus reus*, and the defence of belief in consent was unavailable as a matter of law. As in *Ewanchuk*, *Crangle*, *Dippel*, *Flaviano*, and *Alboukhari*, this conclusion was required as a matter of law given the evidence and the findings of fact at trial.

Curiously however, although Justice Oland worked methodically towards that conclusion, in the end she avoided it by assuming, but not deciding, that the trial judge was correct in

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<sup>87</sup> *IEB*, *ibid.*

<sup>88</sup> *Ibid* at paras 5, 7, citing Justice Moir in reasons for decision at trial (NSSC) (unreported).

<sup>89</sup> *Ibid* at para 5.

<sup>90</sup> *Ibid* at para 33. The accused addressed her as "Corporal" and likely held a higher military rank. Abuse of trust, power, or authority, all circumstances in which consent is not obtained under section 273.1(2)(c), are not mentioned in the reasons for decision at trial and might not have been raised by the Crown.

<sup>91</sup> *Supra* note 48. Section 686(4)(b)(ii) was applied in *Ewanchuk*, *supra* note 16; *Dippel*, *supra* note 19; and by both the Alberta Court of Appeal and the Supreme Court of Canada in *Flaviano*, *supra* note 20.

<sup>92</sup> *IEB*, *supra* note 22 at para 48.

finding the defence of honest mistaken belief in consent to be available. She then held that the trial judge, nonetheless, did err in law by failing to conduct a “reasonable steps” analysis. Justice Oland therefore allowed the Crown’s appeal, but declined to enter a conviction and instead ordered a new trial. The Crown did not seek leave to appeal the decision and abandoned prosecution of the case.

When the *actus reus* has been proven, the defence of belief in consent is unavailable unless the trial judge finds there is evidence of a mistake of fact that could, if believed, result in a lawful acquittal. Error in deciding this issue gives rise to an appealable question of law. Justice Oland appeared well aware that this was the case and quoted at length from a series of leading cases dealing with appellate jurisdiction over acquittals, including analysis of the issue in *Ewanchuk* by Justice Major,<sup>93</sup> in *R. v. JMH* by Justice Cromwell, holding that appellate intervention in an acquittal is permitted where reasonable doubt is tainted by a legal error,<sup>94</sup> and *R. v. B. (R.G.)*, a decision by the Manitoba Court of Appeal to the same effect.<sup>95</sup> Based on these authorities, Justice Oland stated: “[i]f the judge has misdirected himself as to the legal meaning or definition of consent, or the reasonable doubt is tainted by legal error, then his conclusion regarding reasonable doubt becomes a question of law and thus reviewable by an appellate court.”<sup>96</sup> Having painstakingly resolved the jurisdictional issue in favour of the Crown, Justice Oland granted the Crown’s appeal but nonetheless declined to enter a conviction.<sup>97</sup>

Justice Oland acknowledged that the trial judge’s decision to acquit clearly relied on the defence of belief in consent, that the air of reality test applied to all defences, including honest but mistaken belief in consent,<sup>98</sup> and that “[w]hether an air of reality to a defence exists is a question of law, and subject to the standard of correctness.”<sup>99</sup> She reviewed the jurisprudence governing these issues in detail, citing a series of leading decisions, but did not apply those authorities to dispose of the case.

If the trial judge erred in finding an “air of reality” for the defence — as he arguably did, given the findings of fact at trial — the Court could and should have disposed of the appeal in *IEB* by entering a conviction based on the findings of fact at trial, as was done in *Ewanchuk*, *Dippel*, and *Flaviano*, and as the Crown proposed be done here. Where there is insufficient evidence to support the defence of belief in consent (no “air of reality”), the defence is unavailable; section 273.2(b) can add nothing and should not be considered. *Where a defence is unavailable as a matter of law, due to the evidence and findings of fact at trial, it is improper to order a retrial for the purpose of determining whether the defence is available.*<sup>100</sup> The question is already determined.

<sup>93</sup> *Ewanchuk*, *supra* note 16 at paras 21–22, cited in *IEB*, *ibid* at para 17.

<sup>94</sup> *R v JMH*, 2011 SCC 45, [2011] 3 SCR 197 at para 39, cited in *IEB*, *ibid* at para 18.

<sup>95</sup> 2012 MBCA 5, 287 CCC (3d) 463 at para 16, cited in *IEB*, *ibid* at para 19.

<sup>96</sup> *IEB*, *ibid* at para 20.

<sup>97</sup> *Ibid* at paras 21, 48.

<sup>98</sup> *Ibid* at para 39, citing *R v Cinous*, 2002 SCC 29, [2002] 2 SCR 3 at para 57 [*Cinous*].

<sup>99</sup> *IEB*, *ibid*, citing *Cinous*, *ibid* at para 55.

<sup>100</sup> See *Esau*, *supra* note 25 at para 50, McLachlin J (as she then was) dissenting, stating that when minimum conditions set by Parliament in s. 273.2 for availability of the defence are not met, “the defence does not lie.... The proof is in the absurdity of the outcome. The Court of Appeal has directed a new trial solely because the defence of mistaken belief was not put to the jury. *If Parliament has precluded that defence, there is no need for a new trial.* The appeal should accordingly be allowed” [emphasis added]. Two years later, in reasons for the majority in *Ewanchuk*, *supra* note 16, Justice

Accordingly, there was no need for a retrial in *IEB*. Sexual assault is a general intent offence. The *actus reus* was proven at trial and the absence of consent was not disputed in the appeal. The acts that make up the physical elements of the *actus reus* of sexual assault are, absent some evidence to the contrary, presumed to be the acts of a conscious agent who is aware of the circumstances. The trial judge described the accused, IEB, as “someone who ‘intends on sex.’”<sup>101</sup> Given that the trial judge found IEB intended to engage in sexual activity with the complainant, the only other issue was whether *mens rea* with respect to consent was negated by belief in consent. Availability of the defence of belief in consent was therefore crucial for disposition of the case. If the defence was unavailable, *mens rea* could not be negated and the accused would be criminally responsible and liable to conviction.

There was no evidence of “consenting” words or conduct by the complainant. The complainant testified that during the assault she was crying and said neither “yes” nor “no.” It was dark, visibility was poor, and the trial judge noted that there was no evidence that the accused saw or heard her crying.<sup>102</sup> The accused did not testify; the absence of evidence is simply no evidence.<sup>103</sup> The circumstances established by evidence support the conclusion that the accused was wilfully blind or indifferent and reckless towards the issue of consent, not honestly mistaken. The defence cannot be based on bare speculation but must be based on evidence which, if believed by the trier of fact, could be sufficient to support a lawful defence. This has long been the common law and is now codified in section 265(4). In this case there was no evidence to support a defence of “honest” belief in consent. Reasonable doubt with respect to *mens rea* could only be based on speculation.

It is useful to consider the combined effect of sections 273.2(a)(ii), 273.1, and 19 in this case. Section 273.2(a)(ii) provides that the defence of belief in consent is unavailable where the belief is due to recklessness or wilful blindness. Anyone who engages in sexual activity while fumbling around in the dark will be unable to testify about the expression on the other person’s face, that is, whether they were crying or demonstrated any other visible signs of distaste, resistance, fear, revulsion, alarm, or distress. Lack of opportunity to observe, combined with the absence of audible verbal consent to the activity by the other person, renders belief in consent reckless or wilfully blind, at best.

Absent evidence to the contrary, everyone is presumed to be conscious, self-aware, and therefore aware of what he or she knows. IEB knew that the complainant had not said “yes”

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Major largely adopted the position set out in *Esau* by Justice McLachlin, as she then was, with respect to analysis of *mens rea* and availability of the defence of belief in consent.

<sup>101</sup> *IEB*, *supra* note 22 at para 32. Justice Oland states:

In ¶ 27 of his decision, the trial judge described the respondent ... as [someone who] “intends on sex” and [is] keeping his intention to himself “either because he seeks no consent or he is reckless about it.” Yet, from the events that transpired ... he was not satisfied beyond a reasonable doubt that the respondent knew that the complainant was not consenting to the sexual activity or that he was reckless about it. How did he come to that conclusion?

The question that Justice Oland *should* have asked and answered was: “given the record and the findings of fact, was that conclusion correct in law?”

<sup>102</sup> Reasons for decision at trial, reproduced in *IEB*, *ibid* at para 35: “he is entitled to think, absent complete drunkenness, that Ms. [G] knows his intent and is going along with it. There is no evidence he saw tears, or heard cries. In all the circumstances, the absence of a protest is significant.”

<sup>103</sup> The general proposition that the absence of evidence of x, is not evidence of not x, but is instead no evidence with regard to x, is easily overlooked. *Cf R v Czibulka* (2004), 189 CCC (3d) 199 at para 35 (Ont CA).

or otherwise communicated voluntary agreement by her words or conduct; that he had asked the complainant to accompany him without any explanation of where they were going or why; that he was pulling her head to his groin by pulling her hair; and that he could not see the complainant’s face very well and did not know whether she was smiling, grimacing, or crying. Given all those circumstances — all within the knowledge of the accused — it is clear the accused did not have what the law defines as an “honest” belief in consent, but was recklessly indifferent or wilfully blind, at the very best, to the issue of consent.<sup>104</sup> As a consequence, the defence was unavailable pursuant to section 273.2(a)(ii). Under these circumstances, the trial judge did not err in law by failing to do a “reasonable steps” analysis to determine whether the defence of belief in consent was available. The issue was already determined.

Neither the absence of evidence of refusal nor the absence of evidence of what the accused saw and heard while fumbling around in the dark behind the dumpster assist the accused. Section 273.1 defines “consent” as “voluntary agreement of the complainant to engage in the sexual activity in question.”<sup>105</sup> The complainant’s words and conduct did not communicate consent as defined in section 273.1. Passivity, lack of resistance, failure to flee, and failure to refuse do not communicate consent. There is ample judicial authority on this point.<sup>106</sup> Consent must be communicated and affirmative; consent is not simply the absence of refusal. Nonetheless, the trial judge in *IEB* found the “absence of protest ... significant” and concluded that the accused was “entitled” to believe the complainant knew his intent and was “going along with it.”<sup>107</sup> The trial judge therefore acquitted on the ground that the accused might have believed that the complainant consented. That verdict was based on an error about the definition of consent. Consent is never “implied” by a complainant’s conduct. The decision in *Ewanchuk* made that clear. If the accused, IEB, believed the complainant’s conduct, described by the trial judge as “going along with it,” communicated “consent,” the accused was mistaken about the definition of sexual consent.

The trial judge was equally mistaken in holding that such a belief provided the accused with a legally valid and effective mistake of fact defence. The mistake the trial judge surmised the accused might have made was not a mistake about the facts but a mistake about the law and therefore not a lawful basis for acquittal. In turn, the trial judge’s mistake about the availability of the defence of belief in consent based on these putative “facts” was an error on a question of law and therefore grounds for an appeal by the Crown. The Crown appealed from the acquittal at trial, but did not appeal the subsequent decision by the Court

<sup>104</sup> See *Esau*, *supra* note 25 at paras 80–81.

<sup>105</sup> *Criminal Code*, *supra* note 1, s 273.1(1).

<sup>106</sup> *R v M(ML)*, [1994] 2 SCR 3; see also *Ewanchuk*, *supra* note 16 at para 51.

<sup>107</sup> Reasons for decision at trial, reproduced in *IEB*, *supra* note 22 at para 35. “Going along with it” is acquiescence, not consent as defined in section 273.1. The accused was probably fully aware that the complainant was not consenting in *any* sense of the word, legal or non-legal; he may have assumed she would not report the assault and he would get away with it. His final comment as he walked away was: “none of this ever happened, Corporal” (*IEB*, *ibid* at para 33), in what appears to be an attempt to invoke authority to revise history as if this were the prerogative of a superior officer. IEB did not testify. It was improper for the trial judge to speculate and impute assumptions to IEB about sexual favours IEB was “entitled” to anticipate receiving, let alone to rely on those speculations to acquit. It is chilling to find comments about sexual “entitlements” in recent reasons for decision by trial judges in Canada. Such comments only reaffirm and reinforce the invidious assumptions that place complainants at risk of assault and then, after the fact, are routinely invoked to excuse their assailants. Both effects are seen in *IEB*.

of Appeal ordering a new trial, and instead simply abandoned further prosecution of the case. There was no new trial.

When consent, as the law defines consent, is communicated, and the circumstances are not ones in which consent is not “obtained” under section 273.1, the charge should be dismissed. By contrast, if consent is not obtained, any belief in consent is mistaken, at best. In such cases, the crucial question is: “is a defence of mistake of fact available?” Section 19, 265(4), or 273.2(a) may often apply to bar the defence of belief in consent as a matter of law as seen in the cases examined above. When the defence is not barred by one or more of these sections, it will, I suggest, never be barred by “reasonable steps” analysis under section 273.2(b).

### IX. CONCLUSION — SECTION 273.2(B) HAS PREJUDICIAL EFFECTS, WASTES LEGAL RESOURCES, AND REQUIRES AMENDMENT

Section 273.2(b) is redundant and has proven to be a source of error. In view of the jurisprudential developments in the law of sexual assault and *mens rea* since enactment of section 273.2 in 1992, there can now be no question but that the most noteworthy effect of the provision is to create significant risk of prejudice to the reasoning process in sexual assault cases.<sup>108</sup> The prejudice is to the truth finding process and, in turn, to the rule of law and the integrity of the administration of justice.

The decisions examined above show that the effects of section 273.2(b), as applied, can be perverse. We might assume that a “reasonable steps” requirement renders analysis of *mens rea* in relation to consent more robust by ensuring that triers of fact only consider the defence of belief in consent when there actually is some evidence of probative value in relation to a fact material to consent as defined in law under section 273.1. Instead, we see that some judges conclude that when there is no evidence the accused was aware of specific words or conduct that communicated *refusal* to consent, the defence of belief in consent is available. This is seen even when the accused is found to have been aware that affirmative consent had not been communicated or there is no evidence or insufficient evidence to support a claim of non-culpable mistake about facts relevant to communication, voluntariness, capacity, or other factors identified in section 273.1 as circumstances in which consent is not obtained.<sup>109</sup>

Furthermore, we saw that when there is reasonable doubt about the accused’s awareness of some of the factual circumstances proven by the evidence, analysis under section 273.2(b) may be suspended and availability of the defence of belief in consent simply assumed without analysis under section 273.2(a)(ii). This, of course, is an error of law. In many cases, moreover, the absence of evidence of the accused’s awareness of some of the factual

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<sup>108</sup> See *supra* note 2.

<sup>109</sup> Trial decisions can have significant and far-reaching effects on the administration of justice. Decisions by police and prosecutors about whether cases merit full investigation, whether charges should be laid, and which cases should proceed to trial are all influenced, however subtly, by the criteria and legal reasoning methods that members of the local legal community believe are accepted and used by the judges who are likely to preside over any sexual assault case that proceeds to trial in the jurisdiction. Similarly, familiarity with the decision-making styles of judges presiding in the local courts is commonly believed to be a valuable aspect of the criminal justice professional’s “working capital.”



circumstances is viewed speculatively through a broad angle “common sense” lens — unfiltered by the substantive and evidentiary limits of the legal framework provided by sections 19, 265(4), and 273.2(a) — and taken to be sufficient to give rise to reasonable doubt about the absence of belief in consent, entitling the accused to acquittal.<sup>110</sup>

Thus, as applied, section 273.2(b) often complicates and distorts the legal reasoning process in relation to *mens rea*. It shifts attention away from the law — which imposes a positive legal duty on the accused to refrain from sexual activity unless valid affirmative consent, as defined in section 273.1, is communicated by the other party — towards a myriad of factual questions and speculation about what the accused knew about the surrounding circumstances and whether the accused’s conduct might have been “reasonable” given all those circumstances. Many judges — and prosecutors, police, and complainants as well — then use common sense reasoning, free of legal constraints, to deliberate about these questions even though the legal issue is availability of the defence of belief in consent as prescribed by law, not by custom. Common sense reasoning about what the accused knew and what steps were “reasonable” has undeniably prejudicial effects on reasoning, deliberation, and on the overall legal process at each stage of the criminal justice process. Stereotypes and myths about sexuality and sexual communication burst forth and occupy centre stage; assumptions and attitudinal biases fuel inferences, conclusions flow easily and are taken to be “self-evident,” beyond challenge. Private opinions, unconstrained by the rule of law, are then the actual basis for decisions with legal consequences.

The interpretation of “reasonable steps” constitutes a question of law, subject to review on a standard of correctness.<sup>111</sup> Where, as in section 273.2(b), the key term, “reasonable,” is not defined by statute, crucial normative and factual issues are delegated to the decision-makers who interpret and apply the law. Delegation tends to ensure that decisions made in the lower courts and by administrators reflect local opinions and perspectives; this has long been perceived as a strength rather than a weakness in the common law.<sup>112</sup> But delegation of key normative and factual issues to the decision-makers who interpret and apply a law or regulation is most apt to be appropriate in relation to issues about which there is no fundamental social or cultural controversy; availability of the defence of belief in sexual consent is not such an issue.

<sup>110</sup> See *supra* note 103 on the legal significance of the absence of evidence.

<sup>111</sup> As Justice Charron explained in *R v Tran*, 2010 SCC 58, [2010] 3 SCR 350 at paras 40–44 [citations omitted]:

[T]he interpretation of a legal standard (the elements of the defence) and the determination of whether there is an air of reality to a defence constitute questions of law, reviewable on a standard of correctness.... Statements that there is or is not an air of reality express a legal conclusion about the presence or absence of an evidential foundation for a defence.... Thus, this inquiry is not a review of the trial judge’s assessment of the evidence but of the judge’s legal conclusions in relation to the defence.... [T]he judge is the gatekeeper and judge of the law and must therefore put the defence to the jury only where there is evidence upon which a “reasonable jury acting judicially” could find that the defence succeeds.... For the defence to succeed ... the evidence must be reasonably capable of supporting the inferences necessary to make out the defence before there is an air of reality to the defence.... In a trial by judge alone ... the trial judge errs in law if he or she gives effect to the defence ... in circumstances where the defence should not have been left to a jury, had the accused been tried by a jury.

All of this may be “trite” law, but appears to be easily forgotten.

<sup>112</sup> Again, note the systemic differences between common law and civil law approaches to justice; see Elisabetta Grande, “Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth” in Jackson, Langer & Tillers, *supra* note 28, 145; James Q Whitman, “No Right Answer?” in Jackson, Langer & Tillers, *ibid*, 371.

Proponents of the 1992 “reasonable steps” amendment may not have anticipated that trial judges who did not share their world view, vision of social reality, or interpretation of the implications of fundamental legal principles and *Charter* values, would characterize the factual circumstances of sexual assaults in a manner that would often reintroduce the very errors of law, attitudinal biases, and “unreasonable” sexist assumptions that many supporters intended the 1992 provisions to preclude, if not eliminate. It is noteworthy that members of the defence bar did not oppose adoption of section 273.2(b) because they believed trial judges and juries “impose their own inherent objective standards.”<sup>113</sup> In other words, they predicted that section 273.2(b) was unlikely to change much of anything at all! Experience suggests this prediction was largely correct.

We have seen that some judges use “reasonable steps” analysis as a merely supplementary aspect of a comprehensive *mens rea* analysis and thereby avoid legal error; however, others treat section 273.2(b) as a substantive defence, in the manner described above, rather than as a statutory bar. There are examples of misapplications and errors at both the trial and appellate levels. Moreover, when a provincial appeal court grants an appeal and orders a retrial on the ground of an alleged error of law at trial, the decision is not invariably appealed to the Supreme Court of Canada even though it may be of questionable legality and vulnerable to challenge on further appeal.<sup>114</sup> In any event, the retrial may or may not proceed; the Crown may simply abandon prosecution of the case. *Alboukhari*<sup>115</sup> and *IEB*<sup>116</sup> are recent examples of both — no appeal, no retrial, no definitive resolution.

It is obvious that the public interest is not well served when section 273.2(b) leads trial and appellate judges to err. Section 273.2(b) undoubtedly also has a significant impact on the decisions by sexual assault complainants, police, and prosecutors. And there is every reason to believe that the influence of section 273.2(b) in those decisions is no less prejudicial than it is in judicial decisions, while the number of cases that may be affected is vastly greater. No one knows what proportion of sexual assaults are not reported because the survivor anticipates that the assailant may raise a “reasonable steps defence” based on local customs, common sense attitudes, and what the assailant claims to have known and not known about the circumstances. These survivors can hardly be said to enjoy equal protection of the law. The same conclusion applies when no charge is laid or a case is not prosecuted on the ground that a police officer or prosecutor believes section 273.2(b) makes conviction unlikely. Thus the practical effect of section 273.2(b) in its current form is to encourage reliance on common sense reasoning, custom, and the very same type of extra-legal assumptions and beliefs that were used to justify non-prosecution of sexual assailants prior to 1992.

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<sup>113</sup> Roach, *supra* note 10 at 174. See also MP Baumgartner, “The Myth of Discretion” in Keith Hawkins, ed, *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 129 on the historical operation of discretion to include extra-legal considerations in sexual assault cases across jurisdictions and cultures. I suggest that as decisions are made more complex by adding issues for consideration (as was done in enacting section 273.2(b)), the net effect is to increase opportunities for abuse of discretion, even though the changes may be enacted in the belief that they will ensure greater certainty and uniformity in case outcomes. Instead, simplicity is generally the best recipe for certainty; certainty is precisely what the law defining affirmative sexual consent offers.

<sup>114</sup> See e.g. the recent decisions in *R v Nguyen*, 2017 SKCA 30, 348 CCC (3d) 238; *R v Nayyar*, 2017 BCCA 297, 2017 BCCA 297 (CanLII).

<sup>115</sup> *Supra* note 21.

<sup>116</sup> *Supra* note 22.

**A. STATUTORY AMENDMENT**  
**— THE LEGISLATIVE OPTION AND SECTION 273.2**

The irony that surrounds our experience with the progressive law reform initiative section 273.2(b) was believed to be is profound indeed. The analysis presented here suggests that the administration of justice in accordance with the rule of law requires repeal or amendment of section 273.2(b) to eliminate its prejudicial effects in legal reasoning and decision-making. An amendment that clarifies the law is likely to cause less public and professional confusion than simple repeal. Accordingly, it is proposed that the following provision, which is consistent with post-1992 jurisprudential developments related to *mens rea* and the communication of voluntary agreement (that is, affirmative consent), be enacted to amend and augment the present wording of section 273.2. The proposed amendments are underlined:

**273.2(1) Where a belief in consent is not an excuse negating *mens rea*** — On a charge under section 271, 272 or 273, the accused’s belief that the complainant communicated affirmative consent, as defined in section 273.1, to the sexual activity that forms the subject-matter of the charge, is not an excuse that negates *mens rea* and leads to a lawful acquittal, and therefore, pursuant to subsection 265(4) and the common law, is not available as a lawful defence and may not be considered by the trier of fact, where

- (a) the accused’s belief arose from
  - (i) the accused’s self-induced intoxication, or
  - (ii) the accused’s recklessness or wilful blindness; or
  - (iii) the accused’s ignorance of or mistake in interpreting or applying the legal definition of sexual consent in section 273.1, or
- (b) the accused did not take any steps to ascertain that:
  - (i) the complainant’s words or conduct were communicating contemporaneous affirmative consent, i.e., voluntary agreement, to participate in the sexual activity in question;
  - (ii) the complainant was legally and factually capable of consenting to the sexual activity in question; and
  - (iii) the complainant was not subject to or affected by any the circumstances in which sexual consent is not obtained pursuant to s. 273.1.

(2) This section is a non-exhaustive statutory bar that stipulates circumstances in which belief in consent is neither a defence nor an excuse negating *mens rea*.

(3) Nothing in subsection (1) shall be construed as creating a statutory defence of belief in consent.

The legal issue to be determined under section 273.2 is not whether the accused exhibited “due diligence” in ascertaining consent,<sup>117</sup> as the term “reasonable” might suggest, but whether, given the circumstances in evidence, the accused’s claim to have relied on a belief in consent only confirms his or her subjective culpability. The amendment proposed here explicitly provides that failure to take *any* steps to ascertain consent renders the defence of belief in consent unavailable. Period. Full stop. Indifference to the absence of communicated valid affirmative consent or voluntary agreement demonstrates a blameworthy and culpable state of mind — flagrant disregard for the legal duty to obtain valid and contemporaneous affirmative consent to sexual activity as defined by section 273.1. If, by contrast, an accused took “some” steps to ascertain consent and nonetheless claims to have had a mistaken belief in consent, availability of the defence of belief in consent is assessed under section 273.2(a) and barred if the belief was due to impairment, recklessness, wilful blindness, or one or more mistakes about the legal definition of sexual consent or the legal significance of the facts in evidence.

The proposed amendment is based on the implications of fundamental common law principles of criminal responsibility for *mens rea* in sexual assault, a general intent offence. Application of the principle that ignorance of the law is no excuse bars defences of belief in consent that are based on mistakes about the legal definition of consent, its interpretation, or application.<sup>118</sup> Legal duties and the legal presumptions used to give effect to them in the proposed amendment are also based on fundamental common law principles. When our actions are unlawful, the law presumes we act voluntarily, as conscious agents who are aware of both the law and the factual circumstances. Error due to inattention or disregard for either the law or the facts entails culpability, not innocence. Accordingly, an accused is not permitted to negate *mens rea* by claiming to have been mistaken about the facts due to his or her *disregard for or lack of attention* to facts that are material to the *actus reus* of an offence. In the offence of sexual assault, the material facts include the presence or absence of words and conduct communicating voluntary agreement or consent by the other party. Excuses based on non-culpable mistakes about the material facts for which there is evidence that could result in the lawful acquittal of the accused, are permitted.

Explicit codification of both presumptions — that accused are aware of the facts and know the law — is useful in an era in which it is common knowledge that an indeterminate number of the members of Canadian society — including some of the personnel working in the criminal justice system<sup>119</sup> — appear to fail to appreciate that sexual activity entails legal duties: (1) a legal duty to attend to the factual circumstances of sexual activity, in particular

<sup>117</sup> Sexual assault is a general intent offence. See *supra* note 26.

<sup>118</sup> This codifies the proposition set out by Justice Major in *Ewanchuk*, *supra* note 16 at para 51.

<sup>119</sup> This observation is based on the author’s on-going review of reported and unreported cases and anecdotal evidence gathered informally from diverse complainants over many years, and appears to be corroborated by the evidence of significant disparities between jurisdictions across Canada in the patterns of police decisions about sexual assault cases revealed by the data contained in the award winning Globe & Mail Investigative Report entitled “Unfounded,” which was based on 20 months of research country wide, and published in February 2017 (Robyn Doolittle, “Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless,” *The Globe and Mail* (3 February 2017), online: <<https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/>>). A follow-up article reports on investigative research on the reviews of recent “unfounded” cases that have been initiated by diverse police services in response to the original Report (Robyn Doolittle, “The Unfounded Effect,” *The Globe and Mail* (8 December 2017), online: <<https://www.theglobeandmail.com/news/investigations/unfounded-37272-sexual-assault-cases-being-reviewed-402-unfounded-cases-reopened-so-far/article37245525/>>).

facts material to communication of valid voluntary agreement by the parties; and (2) a legal duty to appreciate the legal significance and legal effects of those facts. All decision-makers in sexual assault cases, from complainants to appellate justices, should be assisted by enactment of a *Criminal Code* provision that explicitly codifies and thereby affirms that accused who fail to take any steps to comply with the legal duty to be aware of factual circumstances that are legally relevant to communication of valid consent to sexual activity are, as a matter of law, barred from raising the defence of belief in consent.<sup>120</sup>

## B. JUDICIAL INITIATIVE — A RESPONSIBLE WAY FORWARD

In all the cases examined above, justice was delayed and denied, improperly and unnecessarily. As should be expected, defence counsel relied on section 273.2(b) whenever it was likely to advance the client’s interests. Until section 273.2(b) is repealed or amended, defence counsel will continue to raise it whenever possible precisely because “reasonable steps” analysis, as it is often conducted at present, offers broad scope to generate reasonable doubt with respect to *mens rea* on extra-legal grounds, leading to acquittal.

Ultimate responsibility for the conduct of the criminal justice process before the courts remains with the judiciary, however. We saw that some members of the judiciary continue to err in law with respect to application of section 273.2(b). In the end, the law was enforced in neither *Alboukhari*<sup>121</sup> nor *IEB*<sup>122</sup> even though the records in both cases show that all the elements of the offence of sexual assault were proven at trial. These are obvious cases of “justice denied.” But for the focus on tangential and immaterial issues that section 273.2(b) encourages, both counsel and the bench would have been far more likely to direct their minds to the legal significance of the material facts in evidence in those cases. On such clear facts, a verdict of guilt should have been entered at trial in *Dippel*,<sup>123</sup> *Flaviano*,<sup>124</sup> and *IEB*, as it was in *Crangle*<sup>125</sup> and *Alboukhari*,<sup>126</sup> and the appeal in *Alboukhari* should have been dismissed. The experience with section 273.2(b) thus demonstrates, yet again, that many decision-makers in the criminal justice system are either unwilling to use the sexual assault laws to protect women and other vulnerable persons in Canada or do not understand the law. Errors in application of the law may be due to lack of training and experience, lack of will, or both.

Pending amendment of section 273.2(b) by Parliament, the judiciary can and should make more effective use of the powerful common law and statutory tools that are already available

<sup>120</sup> See Lucinda Vandervort, “‘Reasonable Steps’: Amending Section 273.2 to Reflect the Jurisprudence” (2019) Crim LQ [forthcoming], for succinct subsection by subsection commentary on the draft amendment to section 273.2 proposed here, as well as proposals for related changes to the Model Jury Instructions. Those instructions are drafted, revised, and approved on an ongoing basis by the Canadian Judicial Council’s (CJC) National Committee on Jury Instructions and hosted on the National Justice Institute website as resources for reference purposes. Since the *Criminal Law Quarterly* article was submitted in April 2018, revisions to the Model Instructions for the *Criminal Code*, *supra* note 1, s 271 (sexual assault) that were adopted November 2017 in response to comments by the Court in *Barton*, *supra* note 12, have been posted on the National Justice Institute website, online: <<https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/?lang=Switch=en>>.

<sup>121</sup> *Supra* note 21.

<sup>122</sup> *Supra* note 22.

<sup>123</sup> *Supra* note 19.

<sup>124</sup> *Flaviano ABCA*, *supra* note 20; *Flaviano SCC*, *supra* note 20.

<sup>125</sup> *Supra* note 18.

<sup>126</sup> *Alboukhari Trial*, *supra* note 21.

to dispose of sexual assault cases promptly and with finality. When affirmative consent is not contemporaneously communicated or is ineffective in law, accused who fail to take any steps to ascertain consent are, in most cases, barred at common law and under section 273.2(a)(ii) from relying on a defence of belief in consent, rendering recourse to section 273.2(b) to resolve that question wholly unnecessary. Section 273.2(b), like section 273.2(a), is a statutory bar, not a substantive defence entitling accused to acquittal.

Legal errors and the exercise of discretion by police, prosecutors, defence counsel, and members of the judiciary, all contribute to non-enforcement and under-enforcement of the sexual assault laws, but remedies are available that do not require amendment of the *Criminal Code*. The judiciary can provide decision-makers at all levels of the criminal justice system with the guidance needed to achieve proper enforcement of the sexual assault laws by using the legal tools that are already readily available to render correct decisions, and drafting reasons for decision that make it patently obvious how straightforward the substantive and evidentiary issues actually are.