

# The *Mens Rea* of Sexual Assault: How Jury Instructions are Getting it Wrong

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## ABSTRACT

When instructing juries on the law they must use to decide cases, judges commonly rely on published “standard” charges. This article argues that standard charges for the offence of sexual assault contain a crucial legal error: they identify “knowledge that the complainant did not consent” as an essential element of the offence, when that is not an element of the offence at all. More, that part of the standard charges wrongly asks, in effect, what the complainant did to say “no”, rather than looking to the proper question for the issue of honest but mistaken belief in consent: what the complainant did or said to communicate “yes”. The issue of honest but mistaken belief in consent has its own instruction, to be used when there is an air of reality to require it. Otherwise, the only element of *mens rea* is the intent to touch.

The *Criminal Code* was amended in 1992 to change the legal approach to consent from a negative approach to a positive one. In 1999, the Supreme Court of Canada definitively set out the essential elements of sexual assault, in *R v Ewanchuk*. But the published standard charges have not changed in response to those two foundational moments in the evolution of the law of consent in Canada. This paper examines statute and jurisprudence,

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including *R v Ewanchuk*, to establish this crucial flaw, and the need for change in standard charges to avoid what can fairly be called wrongful acquittals in cases of sexual assault.

**Keywords:** *Barton*; *Ewanchuk*; *Robertson*; Jury instructions; Sexual assault; *Mens Rea*; Consent; Wrongful Acquittal; Rape Myths; Elements of the offence

## I. INTRODUCTION

The last thing a jury hears before retiring to decide an accused's conviction or acquittal is the judge's "charge," or instructions, a review of the evidence and the law applicable to the case that the jury must decide. It is hard to imagine that the substance of that charge is anything but important in shaping the ultimate verdict. When composing their charge, the vast majority of judges rely heavily on "standard" jury charges, often simply adopting them entirely.<sup>1</sup> This article identifies and addresses a significant problem with the central "standard" charge employed in sexual assault cases.

While the law surrounding sexual assault changed significantly over 25 years ago, the standard jury instruction for the offence has not changed.<sup>2</sup> A recent Alberta Court of Appeal decision, *R v Barton*,<sup>3</sup> called for a review of

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<sup>1</sup> In Ontario, at least, the collection published by Justice Watt is likely the most commonly used source of standard instructions: The Honourable Mr Justice David Watt, *Watt's Manual of Criminal Jury Instructions*, 2d ed (Toronto: Carswell, 2015) [Watt's]. The other main source of standard instructions is the set published online by the Canadian Judicial Council, "Model Jury Instructions" (June 2012), online: <[www.nji-inm.ca/index.cfm/publications/model-jury-instructions/?langSwitch=en](http://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/?langSwitch=en)> [perma.cc/CYD6-CDK3] [CJC instructions]. For simplicity of writing, this article will focus on Watt's. The CJC instructions in the area with which this article is concerned differs from Watt's in a number of ways, but only one way is significant for the issue addressed in this paper.

<sup>2</sup> The relevant sections of *The Criminal Code of Canada*, RSC, 1985, c C-46 [*Criminal Code*] were amended significantly in 1992. The leading case on the elements of sexual assault, *R v Ewanchuk*, [1999] 1 SCR 330, [1999] SCJ No 10 (QL) [*Ewanchuk*] was decided by the Supreme Court of Canada in 1999. Watt's (*supra* note 1) was last updated in 2015 but that edition, the second, made no changes to the charge on sexual assault found in the 1<sup>st</sup> edition (2005).

<sup>3</sup> *R v Barton*, 2017 ABCA 216 at paras 1, 8, 155-159 [*Barton*]. *Barton* was appealed to the Supreme Court of Canada and a decision in that appeal was released after this article

the standard jury instructions given in sexual assault cases, identifying many possible problems. In *Barton*, the jury was asked to decide whether the victim died as the result of an accident during consensual sex, or from murder or manslaughter during a sexual assault. The Court of Appeal overturned Barton's acquittal, citing numerous errors of law in the jury's instructions, including problems relating to implicit myths and stereotypes and to meaningful though stylistic issues, such as whether the word "force" is, while legally correct, ultimately misleading to a jury. More generally, the Court of Appeal observed a disjunction between the standard charges that are still in use, and the current state of Canadian law, expressing concern that "[k]ey provisions in some jury charges have fossilized concepts Parliament sought to remove a quarter century ago."<sup>4</sup>

This article echoes *Barton's* call to reconsider the standard instructions in cases of sexual assault, and argues, more specifically, that the most fundamental failing in the standard jury charge is that it misdescribes the essential elements of the offence. More than being unclear or overly legalistic, the standard jury charge has at its core an erroneous instruction that includes two fundamental problems: it actively instructs the jury that the Crown must prove, beyond a reasonable doubt as an essential element of the offence, something that is not an element of the offence at all, and it implicitly but importantly misinstructs the jury as to the very nature of consent by emphasizing the absence of resistance to sexual contact instead of the need to obtain positive consent in advance of sexual contact. Such essential and substantive problems must be corrected for juries to adjudicate sexual assault cases properly.

This double-barrelled error inevitably courts what can fairly be called unjust acquittals. Once this problem is properly understood, however, and the reluctance to accept that courts have been in error for a quarter century or more has been overcome, it becomes fairly easy to construct a proper instruction to the jury, as we will show. As soon as they accept the need for

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was submitted for publication: *R v Barton*, 2019 SCC 33. The issues raised in *Barton* on which this article focuses were not grounds of appeal or the subject of argument by counsel at either level. Rather, they were raised by the Alberta Court of Appeal on its own initiative. The Supreme Court, in turn, focused its judgment on s 276 of the *Criminal Code* and on related errors with respect to honest mistaken belief in communicated consent. At paragraph 209, the majority expressly declined to comment on other issues dealt with by the Court of appeal "in admirable detail." The questions addressed by this article, consequently, are not resolved by the Supreme Court in its judgment in *Barton*.

<sup>4</sup> *Ibid* at para 8.

long over-due change, a change within their grasp if only they will make it, there is good reason to think our courts will become just a little more effective and just in prosecuting sexual offences. The first step on that road, though, is understanding just how essential the need is.

## II. THE CHALLENGED INSTRUCTION – WATT’S

The standard instruction from Watt’s for sexual assault cases, Final Instruction 271, describes the essential elements of the offence (for cases not involving a claim of honest but mistaken belief in consent),<sup>5</sup> as follows:

[2] For you to find (NOA) [name of accused] guilty of sexual assault, Crown counsel must prove *each* of these essential elements beyond a reasonable doubt:

- i. that (NOA) *intentionally* applied force to (NOC) [name of complainant];
- ii. That (NOC) did *not* consent to the force that (NOA) (*intentionally*) applied;
- iii. that (NOA) knew that (NOC) did not consent to the force that (NOA) (*intentionally*) applied; and
- iv. that the force that (NOA) (*intentionally*) applied took place in circumstances of a sexual nature.

...

[6] Did (NOA) *know* that (NOC) did *not* consent to the force that NOA (*intentionally*) applied?

This element requires Crown counsel to prove knowledge, a state of mind, (NOA)’s state of mind. Crown counsel must prove beyond a reasonable doubt that (NOA) *knew* that (NOC) did *not* consent to the force that (NOA) (*intentionally*) applied. To “know” something is to be aware of it, at the time you do it.<sup>6</sup>

The assertion of this article is that the parts of the standard charge underlined above, (collectively, the “challenged instruction”), both describe an essential element of the offence of sexual assault that does not, in fact, exist, and mischaracterize the essential nature of consent in Canadian law. They should not be included in the charge to the jury. Instead, the jury

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<sup>5</sup> Watt’s, *supra* note 1, instruction Final 271. This instruction changes significantly, however, for cases in which there is an air of reality to “honest but mistaken belief” or, as Watt’s refers to it, “apprehended belief,” in consent. The specifics of the changes will be addressed below.

<sup>6</sup> *Ibid*, instruction Final 271 [italics & bolding in original; underlining added]. The CJC instructions (*supra* note 1) outline essentially the same elements for cases not involving a claim of honest but mistaken belief in consent. The relevant text of the CJC charge is provided in Appendix 2.

should be instructed that the only intent they need to consider is the intent to touch.

The challenged instruction tells the jury that the Crown must prove knowledge of a lack of consent when that is not, in fact, a requirement of Canadian law. This cannot be overemphasized. If it follows this misdirection, a jury that finds beyond a reasonable doubt that the other listed elements of the offence (voluntary application of force in a sexual context without consent) have been proved, but still has a doubt about whether the accused knew the complainant was not consenting, will acquit, when it should, and would if properly instructed, convict. Put another way, some people charged with sexual assault, who should and would be properly convicted by juries under Canadian law as it actually exists, are improperly acquitted as a result of this incorrect, frequently used, instruction. This article considers statute and jurisprudence to establish this troubling truth and argue that the standard jury charge needs to be changed.

### III. THE CHALLENGED INSTRUCTION – CJC VERSION

The CJC instruction on the elements of the offence of sexual assault was revised in June of 2018, in part, at least, in response to *Barton*.<sup>7</sup> This revision made a number of laudable changes, such as the use of the language of “touch” instead of “force” and an increased emphasis on consent as relating to “the sexual activity in question.” Retained, however, are both the problematic requirement already described in Watt’s that the Crown prove that the accused knew the complainant did not consent to the sexual activity in question and a difference between the CJC standard instruction and Watt’s that aggravates the problem argued in this paper.

This difference, which relates to the subject of this paper, is found in the effect of footnotes 3 and 4 in Watt’s instruction Final 271. Those footnotes apply only where the question of honest but mistaken belief in consent, or, as Watt’s refers to it, apprehended consent, is raised.<sup>8</sup> In such

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<sup>7</sup> Endnote 11 of the revised CJC instruction raises an argument based on *Barton* that is very much relevant to the subject of this paper, however, and it will be addressed directly below.

<sup>8</sup> Watt’s, *supra* note 1, instruction Final 271, n 3-4. In this context, “is raised” must be taken to mean, is raised by the evidence to a level that gives the question an air of reality. Honest but mistaken belief in consent is often called a “defence,” but it is not, in law, something with respect to which the accused bears any burden. Where there is an air of reality to the issue such that it should be considered by the jury, the burden remains

a case, footnote 3 would change the opening wording of Watt's element iii from "that (NOA) knew that (NOC) did not consent to the force..." to "that (NOA) did not honestly believe that (NOC) consented to the force..."<sup>9</sup> Footnote 4, then, removes paragraph 6 and substitutes for it the instruction on honest but mistaken belief, instruction Final 65-D.<sup>10</sup> For a case where honest mistaken belief is to be considered, the resulting Watt's charge does not carry the flaw with which this article is concerned.

The CJC instruction, in contrast, for cases in which the accused advances a claim of honest but mistaken belief, simply adds instructions relating to that issue, without removing the CJC version of the challenged instruction. Consequently, the CJC instruction would maintain the problem with which this article is concerned in every case, whether honest but mistaken belief is to be considered or not. For cases where honest but mistaken belief is not to be considered, Watt's instruction and the CJC instruction, while differing in some aspects of wording, will still describe in effect the same essential elements of the offence. But for cases where honest mistaken belief is to be considered, Watt's removes the challenged instruction and substitutes the instruction for honest mistaken belief, but

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with the Crown to disprove honest but mistaken belief in consent beyond a reasonable doubt. Nor does the accused bear any burden of calling evidence with respect to honest but mistaken belief in consent. Though it will often be to the accused's advantage to call evidence, the question may be raised in some cases by the evidence called by the Crown, without any defence evidence being called. The only sense in which the defence bears a burden with respect to honest but mistaken belief in consent is the application of the air of reality test. If the defence wishes to argue to the jury, or to a judge sitting alone for that matter, that the accused should be acquitted because the Crown has failed to disprove honest but mistaken belief in consent, then the defence must persuade the judge as trier of law that there is evidence, either Crown or defence or some combination of both, that makes that an issue worth considering. The air of reality test is not onerous, but it does exist. If there is no air of reality to honest but mistaken belief, for instance in the clearest of cases, where the complainant's evidence is that the accused was a complete stranger who grabbed her off the street and sexually assaulted her and the accused's evidence is that he was not even in that part of town at the time, then the issue is not even considered. Even where the victim and accused are known to each other but her evidence is that she was saying no and physically resisting and his evidence is that she initiated the sexual activity and was clearly and obviously stating her consent, honest but mistaken belief in consent is not considered by the trier of fact, as the issue clearly is not raised. That trial would be about the credibility of the witnesses and whether there was actual consent: *Ewanchuk*, *supra* note 2 at para 30.

<sup>9</sup> *Ibid.*

<sup>10</sup> Watt's, *supra* note 1, instructions Final 65-D and Final 271. The relevant text of these instructions is provided in Appendix 1.

the CJC instruction gives both the challenged instruction and the honest but mistaken belief instruction. The jury would, in those cases, be told that they must find beyond a reasonable doubt that “[the accused] knew that [the complainant] did not consent...or, that [the accused] did not honestly believe that [the complainant] consented...”<sup>11</sup> This double instruction, then, at best simply retains the flaws of which this article complains: misdescribing the nature of consent and requiring the Crown to prove an essential element that does not exist in law.

But, more problematically than in *Watt’s*, the CJC instruction risks confusing juries in cases in which honest mistaken belief is to be considered. Two mental states are described, honest belief in consent and ignorance of a lack of consent. A jury would reasonably think that they must be different and must both be proven. Where *Watt’s* substituted one element for another, the CJC adds the elements together, describing more things the Crown must prove and aggravating the basic problem about which this paper complains. The rest of this paper will attempt to explain and defend that complaint.

#### IV. STATUTE – THE *CRIMINAL CODE*

There are a number of sections relating to the offence of sexual assault in the *Criminal Code*. Related sentencing considerations and aggravating factors specific to sexual assault are provided in ss. 271-273. The defence of honest but mistaken belief in consent, in the context of sexual assault, is further explained and limited in ss. 273.1 and 273.2.<sup>12</sup> The most fundamental section, in terms of the elements of the offence, however, is section 265, reproduced here:

- 265 (1) A person commits an assault when
- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
  - (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
  - (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

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<sup>11</sup> CJC instructions, *supra* note 1 at Offence 271: Sexual Assault.

<sup>12</sup> *Criminal Code*, *supra* note 2, ss 273.1, 273.2.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

(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.

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.<sup>13</sup>

The language of the *Criminal Code* thus requires the intentional application of force, without the consent of the complainant. Section 271 adds the requirement of a sexual context for sexual assault.<sup>14</sup> At no point do these sections mention as an element of the offence that the accused must know that the complainant is not consenting.

By way of contrast, s. 162.1 sets out the elements for the offence of publishing an intimate image in a way that explicitly includes such knowledge:

Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty...<sup>15</sup>

This section clearly shows that, when Parliament wishes to make knowledge of a lack of consent an element of an offence, Parliament uses words to make that clear and explicit. No such words being used in s. 265, it follows that knowledge of a lack of consent is not an element of the offence of assault, including sexual assault. The contrast between these two sections cannot be reconciled without accepting that knowledge of a lack of consent is not an element of assault or sexual assault. The offence is defined by statute, and the statute is clear.

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<sup>13</sup> *Ibid*, s 265.

<sup>14</sup> *Ibid*, s 271. This addition is effected simply by using the word “sexual”: “Everyone who commits a sexual assault is guilty of....”

<sup>15</sup> *Ibid*, s 162.1 [emphasis added].



Moreover, if knowledge of a lack of consent were included as an element of the offence, the explicitly codified honest but mistaken belief in consent provisions would be redundant. An accused who knows that the complainant is not consenting cannot simultaneously believe that she is. If knowledge of a lack of consent were an element of the offence, why would there ever be a need for the Crown to establish, also, the absence of a belief in consent? Explicitly saying that honest but mistaken belief in consent is exculpatory would be tautological if the more onerous burden of showing knowledge of a lack of consent already existed. Any accused who would be acquitted based on an honest but mistaken belief in consent also would be acquitted based on the Crown's inability to prove knowledge of a lack of consent. Parliament must be presumed to have crafted the sections with respect to honest but mistaken belief in consent in order to have an effect. If the challenged instruction accurately describes the elements of the offence, that legislative intent makes no sense.

Further, the codified limitations on honest but mistaken belief in consent would be meaningless. For instance, the *Criminal Code* requires that an accused relying on honest but mistaken belief in consent must have taken reasonable steps to ascertain consent.<sup>16</sup> Effectively, the *Criminal Code* identifies a particular state of mind, which has been reached in a particular way, as negating liability. This would make no sense at all, if the *Code* also defined the *mens rea* in terms that negated liability regardless of the way in which that mental state was reached. That is, an accused who is unable to rely on the defence of honest but mistaken belief in consent because he did not take reasonable steps to ascertain consent could nonetheless rely on his lack of knowledge, since the statutory conditions and exclusions in s. 273.2 are not put before a jury except when s. 265(4) is in issue. The result would be that it would be easier for a jury to acquit in cases without an air of reality to honest but mistaken belief in consent, than in cases with one, because there would be no consideration of what reasonable steps had or had not been taken. Such an absurdity cannot be taken as the intention of Parliament and should not be preferred to a tenable reading that achieves the recognized legislative purpose.

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<sup>16</sup> *Ibid*, s 273.2(b).

V. JURISPRUDENCE – *EWANCHUK*

*R v Ewanchuk*<sup>17</sup> continues to be the leading case on the elements of sexual assault. In *Ewanchuk*, the teenaged complainant was sexually assaulted during a job interview. The accused argued that the complainant consented, or that he acted on the belief that she consented, putting both the *actus reus* and the *mens rea* in issue. A close reading of this and related cases both supports the interpretation of the *Criminal Code* advanced above, and provides independent authority for the proposition that the challenged instruction about the *mens rea* of sexual assault is wrong in law and ought not to be put to the jury.

*Ewanchuk* is explicit on the issue of *mens rea*: “Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement.”<sup>18</sup> This is a simple and direct statement by the Supreme Court of Canada that includes nothing like a burden on the Crown to prove that the accused knew that the complainant was not consenting. At the same time, the term “basic” *mens rea* suggests that there may be more than is explicit in this paragraph. The case explains what that something more is, in the very next paragraph:

However, since sexual assault only becomes a crime in the absence of the complainant’s consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent [citation omitted]. As such, the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched.<sup>19</sup>

From this explanation, it becomes clear that, when the Court refers to knowledge of the lack of consent, what is actually meant is the defence of mistake of fact, now called honest but mistaken belief in consent. In other words, in order to avoid convicting the morally innocent, we must allow for such an exculpatory claim of honestly held mistaken belief about consent; as such, and only as such, is there an element of the offence that is more

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<sup>17</sup> *Ewanchuk*, *supra* note 2.

<sup>18</sup> *Ibid* at para 41 [emphasis added].

<sup>19</sup> *Ibid* at para 42 [emphasis added].

than the basic *mens rea* described in the previous paragraph: the intention to touch.

Perhaps confusingly, the Court in *Ewanchuk* uses two different phrases to refer to the same thing: “a defence of mistake of fact” and “knowing of, or being reckless of or wilfully blind to, a lack of consent.” However, there is no other way to read the two paragraphs cited above, except as using those phrases to refer to the same thing. This alternate wording can also be observed in an earlier paragraph, which serves as a general introduction to the case’s review of the elements of sexual assault:

A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.<sup>20</sup>

Notably in this connection, however, this paragraph relates the phrase “knowing of” to “words or actions,” which are at the core of an assertion of honest but mistaken belief in consent, as can be seen by the contrast made between consent in the context of the *actus reus* and consent as part of the *mens rea*:

There is a difference in the concept of “consent” as it relates to the state of mind of the complainant *vis-à-vis* the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea*. For the purposes of the *actus reus*, “consent” means that the complainant in her mind wanted the sexual touching to take place.

In the context of *mens rea* – specifically for the purposes of the honest but mistaken belief in consent – “consent” means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. This distinction should always be borne in mind and the two parts of the analysis kept separate.<sup>21</sup>

The references to “words and actions” and to “words and conduct” are clearly intended in the same way. Similarly, the discussions of “knowing” and “honest but mistaken belief in consent” are also referring to the same thing. Read this way, the cited paragraphs are coherent and consistent. Any attempt to read them as including a *mens rea* element of knowledge of lack of consent apart from an honest but mistaken belief in consent relies on reading specific passages in isolation from the judgement as a whole.

Another helpful paragraph in *Ewanchuk* in this regard is paragraph 30:

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<sup>20</sup> *Ibid* at para 23 [emphasis added].

<sup>21</sup> *Ibid* at paras 48-49.

The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief is raised in the mens rea stage of the inquiry.<sup>22</sup>

This paragraph, though found in the part of the judgement that is focused on the elements of the *actus reus* rather than the *mens rea*, looks ahead to the *mens rea* analysis. Logically it follows from the assertion in this paragraph that the accused's perception of the complainant's state of mind is only relevant when the defence of honest but mistaken belief is raised, that if honest but mistaken belief is not raised, then the accused's perception of the complainant's state of mind is not relevant, i.e., is not relevant at all. That could not be so if knowledge that the complainant was not consenting were an element of the offence apart from honest but mistaken belief.

Paragraphs 41 and 42 of *Ewanchuk* are referred to in *Barton*, where the Alberta Court of Appeal adverts to this question: "What must the Crown prove where there is no live issue of mistaken belief in consent?"<sup>23</sup> The Alberta Court does not offer an opinion, however, simply calling for "further consideration" in the next paragraph:

If the Crown must prove the *mens rea* that applies for the purposes of the honest but mistaken belief in consent defence regardless of whether mistaken belief in consent is even a live issue, then that would lead to this result. The Crown would bear the burden of disproving mistaken belief in consent in every sexual assault case even where mistaken belief is not a live issue whether because the air of reality threshold has not been met or the accused has advanced no such defence. This is another area in which we would invite further consideration by the national jury committee on how best to instruct jurors in this instance.<sup>24</sup>

In turn, the revised CJC instruction refers to a possible interpretation of *Ewanchuk* raised by these paragraphs of *Barton*, that "intent to touch is the only requirement for *mens rea*, except in those cases where there is an air of reality to the defence of honest belief in consent."<sup>25</sup> The CJC does not adopt this approach, though, for its standard instruction, pointing to *R v*

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<sup>22</sup> *Ibid* at para 30 [emphasis added].

<sup>23</sup> *Barton*, *supra* note 3 at para 238.

<sup>24</sup> *Ibid* at para 240.

<sup>25</sup> CJC instructions, *supra* note 1 at Offence 271: Sexual Assault, n 11.

JA,<sup>26</sup> specifically to paragraph 24 of that case, the opening sentence of which is, “A person has the required mental state, or *mens rea* of the offence, when he or she knew that the complainant was not consenting to the sexual act in question, or was reckless or willfully blind to the absence of consent.”<sup>27</sup> There are a number of reasons, however, for discounting this passage of JA that are not addressed in the CJC endnote.

First, it must be remembered that JA was a case about sexual choking. The legal issue was whether consent in fact (that is, as an element of the *actus reus*), could be given in advance for sexual activity to take place when the “complainant” was unconscious.<sup>28</sup> *Mens rea* was not an issue before the court.

Second, as already argued, and as will be further argued below, the Court had used that phrase, “knowledge of...” and honest mistaken belief to refer to the same thing. That this sentence was not simply continuing that, no doubt unfortunately confusing, equivalence of language is not clear by any means.

Third, the Court in JA also wrote:

The provisions of the *Criminal Code* that relate to the *mens rea* of sexual assault confirm that individuals must be conscious throughout the sexual activity. Before considering those provisions, however, it is important to keep in mind the differences between the meaning of consent under the *actus reus* and under the *mens rea*. Under the *mens rea* defence, the issue is whether the accused believed that the complainant *communicated consent*. Conversely, the only question for the *actus reus* is whether the complainant was subjectively consenting in her mind. The complainant is not required to *express* her lack of consent or her revocation of consent for the *actus reus* to be established.<sup>29</sup>

Paragraph 37 of JA, when read along with the referred to paragraphs in *Ewanchuk*, excerpted above, reads very much in line with the position in this paper and contrary to the reading of paragraph 24 of JA relied on by the CJC. Notably, paragraph 49 from *Ewanchuk* about *mens rea* is referred to both by the Court in JA at paragraph 37 and the Alberta Court of Appeal in *Barton* at paragraph 238. *Barton* relates paragraph 49 of *Ewanchuk* to paragraph 42 in a way that is consistent with the position taken in this paper and inconsistent with the CJC’s reading of paragraph 24 of JA. The CJC

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<sup>26</sup> *R v JA*, 2011 SCC 28 [JA].

<sup>27</sup> *Ibid* at para 24.

<sup>28</sup> *Ibid* at para 1.

<sup>29</sup> *Ibid* at para 37 [citation omitted; emphasis in original].

endnote, in turn, while relying on paragraph 24 of *JA* does not advert to paragraph 37 and does not, in any substantive way, respond to the point made in *Barton*. Ultimately, when read as a whole and considered in light of what was in issue in the case, *JA* does not provide any helpful authority with respect to the interpretation of *Ewanchuk*'s description of the *mens rea* of sexual assault.

*Ewanchuk*, itself, however, read properly, as a whole and as argued above, actively denies a mental element of the offence of sexual assault such as the one described by the challenged instruction. As a final illustration of this reading of *Ewanchuk*, it is worth looking at the summary paragraphs of the majority judgment, paragraphs 61-66. Those paragraphs directly refer to honest but mistaken belief but make no reference to knowledge of the absence of consent. If the Court in *Ewanchuk* had intended the latter to be an independent element of the offence, they would be expected to mention it in the summary of the case. The absence of any such mention supports the reading proposed here. The challenged instruction, therefore, incorrectly tells the jury that the Crown must prove something that is not part of the prosecution's burden. Absent an air of reality to an assertion of honest but mistaken belief in consent, the Crown need only prove the "basic" *mens rea* of the intention to touch.

## VI. JURISPRUDENTIAL CONTEXT: CASES BEHIND *EWANCHUK*

For some, reading isolated sentences in *Ewanchuk*, such as the one discussed above, or reading paragraph 24 of *JA* in isolation, will still generate discomfort with abandoning the challenged instruction. As well, some may feel that the criminal law requires that every element of the *actus* must be mirrored by a corresponding element of *mens rea*.<sup>30</sup> It is useful, in addressing these concerns, to look at some of the cases to which *Ewanchuk* refers in this connection, to see whether they support one reading or another.

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<sup>30</sup> See e.g. David M Paciocco, "Subjective and Objective Standards of Fault for Offences and Defences" (1995), 59 Sask L Rev 271; Brian Rolfes, "The Golden Thread of Criminal Law - Moral Culpability and Sexual Assault" (1998), 61 Sask L Rev 87.

### A. *Robertson*

*R v Robertson*<sup>31</sup> is the case most directly on point. In that case, the complainant was sexually assaulted in her apartment by a stranger who pretended to be a friend of her roommate. The accused did not testify and there was no evidence on the record to support his claim to have believed that the complainant consented. The trial judge gave what this article would adopt as the correct instruction (absent an air of reality to an assertion of honest but mistaken belief in consent).<sup>32</sup> The judge instructed the jurors that, to convict, they “must conclude that the Crown had proved beyond a reasonable doubt that the accused engaged in intentional touching of a sexual nature without the consent of the complainant” and further that “the only intent, the only mental element you need consider is the accused’s intention to touch the complainant.”<sup>33</sup> The accused was convicted. The accused appealed, arguing essentially that the challenged instruction should have been given. The Court of Appeal agreed with the accused and ordered a new trial. But, on further appeal by the Crown, the Supreme Court rejected the accused’s argument and reversed the Ontario Court of Appeal, finding “there was no error in the trial judge’s charge to the jury.”<sup>34</sup>

On one level, *Robertson* is simply authority for the proposition that the trial judge in that case did not err. There are, however, broader implications that follow logically and necessarily from that finding. Nothing in the judgement attempts to limit the Supreme Court’s decision to the specific case, based on, for instance, unusual facts or other case-specific factors. So, if the trial judge in *Robertson* did not err in instructing a jury that the only mental element it needed to consider was the intention to touch, then another trial judge instructing a jury in a case not involving honest but mistaken belief in consent would not err in using the same instruction. In essence, it follows that the negative phrasing, “no error” carries here also the positive meaning of “was correct.”

But if the instruction in *Robertson* was correct, it is correct to omit the challenged instruction that the Crown must prove knowledge that the complainant was not consenting. This cannot be reconciled with the claim that such knowledge is actually an element of the offence. It follows, then,

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<sup>31</sup> *R v Robertson*, [1987] 1 SCR 918, [1987] SCJ No 33 (QL) [*Robertson*].

<sup>32</sup> As must always be kept in mind, honest but mistaken belief in consent is only the subject of a jury instruction when there is an air of reality.

<sup>33</sup> *Robertson*, *supra* note 31 at 928 [emphasis added].

<sup>34</sup> *Ibid* at 940 [emphasis added].

from the Court's statement that the trial judge in *Robertson* made "no error," that knowledge that the complainant did not consent is not, actually, an element of the offence distinct from honest but mistaken belief in consent. Taking the next step, if knowledge that the complainant is not consenting is not an element of the offence, then it follows that a jury should not be instructed that it is. In other words, it is an error to give the challenged instruction in any case.<sup>35</sup>

Further support for the proposition that knowledge of the absence of consent is not an element of the offence can be found elsewhere in *Robertson*. For instance, when discussing the defence of honest but mistaken belief in consent, Wilson J wrote for the Court:

The previous decisions of this Court, in particular *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120 and *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, establish several propositions. First, the *mens rea* for rape includes knowledge that the woman is not consenting or recklessness as to whether she is consenting or not.

Traditionally the Court has described this *mens rea* requirement as a defence of mistake of fact available to the accused. This is how McIntyre J, speaking for the majority described it in *Pappajohn*.<sup>36</sup>

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<sup>35</sup> This article focuses on Supreme Court of Canada jurisprudence, for obvious reasons. It is worth mentioning, still, that, in *R v Skeddon*, 2013 ONCA 49, the Ontario Court of Appeal relied directly on *Robertson* as "clear authority contrary to the position that such an instruction [essentially, the challenged instruction] is always required in a sexual assault case" (at paras 7-8). The same logic articulated with respect to the finding in *Robertson* would apply to the finding in *Skeddon*. This article argues that it is an error in law to *ever* give the challenged instruction. If the challenged instruction describes, as it purports to do, an essential element of the offence, it cannot be optional. It either is an element, and so must always be given, or it is not, in which case it should never be given. Remember that there is never discussion of applying an air of reality gatekeeper test to the challenged instruction; that is always discussed in the context of honest but mistaken belief in consent. But the challenged instruction cannot be referring to honest but mistaken belief in consent, if for no other reason than that both Watt's and the CJC instructions have separate, other, instructions that are engaged when honest but mistaken belief in consent is in issue. Courts are often hesitant to express themselves in terms beyond the single case in front of them, and make the bare minimum finding necessary, hence the use of language such as "not always required." In this instance, the logic of the issue requires this to be understood more broadly, however. Any other understanding, for all the reasons argued in this article, would be incorrect and incoherent.

<sup>36</sup> *Robertson*, *supra* note 31 at 930-932 [citation & case excerpt omitted].



Consider how this last paragraph reads if one simply substitutes into it the full phrase from the preceding paragraph that is referred to by “this mens rea”:

Traditionally the Court has described this *mens rea* requirement [knowledge that the woman is not consenting or recklessness as to whether she is consenting or not] as a defence of mistake of fact available to the accused. This is how McIntyre J., speaking for the majority described it in *Pappajohn*.

This substitution makes it clear that what might appear to be a statement that knowledge of a lack of consent is an element of the offence is, in fact, intended as a reference to the issue of honest but mistaken belief in consent. Such a reading of these paragraphs is made all the more necessary by the actual finding in the case, as described above. Read together, these passages are clear that, while an honest but mistaken belief in consent can be asserted, (where, only where, there is an air of reality to the issue),<sup>37</sup> the proper instruction to the jury otherwise is that “the only mental element you need consider is the accused’s intention to touch the complainant.”

*Robertson* is thus authority, by the Supreme Court, for the proposition that knowledge of the absence of consent is not an element of the offence. Additionally, the Supreme Court relies on *Robertson* in *Ewanchuk*, which militates strongly in favour of the interpretation of *Ewanchuk* that is advanced above. Similarly, the references in *Ewanchuk*, and in *J.A.* for that matter, to knowledge that the complainant did not consent can comfortably be seen as references, in fact, to an assertion of honest but mistaken belief in consent, paralleling the equivalent use of those phrases in *Robertson*.<sup>38</sup>

Moreover, *Robertson* provides authority for the argument made above with respect to redundancy. The defence had argued “that the accused’s knowledge that the complainant is not consenting is an essential element of the offence. Therefore, the trial judge must in every case tell the jury that the Crown must satisfy them beyond a reasonable doubt that the accused knew that the complainant was not consenting or was reckless as to whether she was consenting or not before they can convict.”<sup>39</sup> This was argued as being in addition to a codified defence of honest but mistaken belief in

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<sup>37</sup> *Ibid* at 933.

<sup>38</sup> This equivalency of language, repeated as we have seen in *Ewanchuk*, further erodes any reliance placed on paragraph 24 of *JA*, such as is employed by the CJC in its endnote 11.

<sup>39</sup> *Robertson*, *supra* note 31 at 930.

consent, provided at the time by the then s. 244(4), (now, s. 265(4), excerpted above). Wilson J, writing for a unanimous court, observed: “It is self-evident that if the accused's counsel is correct, s. 244(4) is rendered redundant. If the issue of honest but mistaken belief is always going to reach the jury as an element of the offence, what does it matter if sometimes it will also reach the jury as a defence?”<sup>40</sup>

The Court’s subsequent analysis of the defence of honest but mistaken belief in consent, and the need for an “air of reality” to be present for the issue to be put to a jury, must be understood in the context of this concern, and, at least in part, as an attempt to avoid this redundancy. The Court found that “where there is sufficient evidence for the issue [of an honest but mistaken belief in consent] to go to the jury, the Crown bears the burden of persuading the jury beyond a reasonable doubt that the accused knew the complainant was not consenting or was reckless as to whether she was consenting or not.”<sup>41</sup> In other cases, this is not to be identified as part of the Crown’s burden: “the inclusion of s. 244(4) in the *Code* makes it clear that the trial judge should not in every case instruct the jury to consider whether the accused had an honest, though mistaken, belief in consent. The trial judge should only give such an instruction when certain threshold requirements have been met.”<sup>42</sup>

Taken as a whole, it is clear that *Robertson* shows the Court grappling with the question of what function the defence of honest but mistaken belief in consent is supposed to have in the law surrounding sexual assault, and what the difference is supposed to be between cases in which it is in play, and cases in which it is not. That difference is defined in terms of whether or not the judge instructs the jury to consider the accused’s mental state with respect to consent. Such an instruction is to be given in cases in which there is an “air of reality” to ground the codified defence, and only in those cases. Further, the substance of the instruction must represent the law as it exists in relation to honest but mistaken belief, not to any other distinct element, such as the one the challenged instruction purports to describe. To do otherwise is to render honest but mistaken belief in consent a meaningless legal concept and nullify Parliament’s intention to distinguish between cases in which it is in issue and cases in which it is not in issue.

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* at 933 [emphasis added].

<sup>42</sup> *Ibid* at 938.

## B. *Creighton*

*R v Creighton*<sup>43</sup> is helpful in addressing the concern that knowledge of a lack of consent is necessary in the *mens rea* to mirror the “without consent” element in the *actus reus*. In *Creighton*, the accused injected the victim with cocaine, and she died as a result. *Creighton* directly addresses this general desire for symmetry between the *mens rea* and the *actus reus*:

It is important to distinguish between criminal law theory, which seeks the ideal of absolute symmetry between *actus reus* and *mens rea*, and the constitutional requirements of the *Charter*. As the Chief Justice has stated several times, “the Constitution does not always guarantee the ‘ideal’”.

I know of no authority for the proposition that the *mens rea* of an offence must always attach to the precise consequence which is prohibited as a matter of constitutional necessity. The relevant constitutional principles have been cast more broadly. No person can be sent to prison without *mens rea*, or a guilty mind, and the seriousness of the offence must not be disproportionate to the degree of moral fault. Provided an element of mental fault or moral culpability is present, and provided that it is proportionate to the seriousness and consequences of the offence charged, the principles of fundamental justice are satisfied.<sup>44</sup>

*Creighton* is not a case about sexual assault, but about whether a conviction for manslaughter required foreseeability of death rather than merely foreseeability of bodily harm, and, specifically, about the “thin skull” rule. In the paragraph above, the court answers, no. Exact symmetry between *actus reus* and *mens rea* is not necessary, as long as there is a proportionate guilty mind. Proportionality was relevant in *Creighton* because the symmetry or lack of symmetry in question related to the degree of foreseen consequence. It is worth noting that *Creighton* is relied on by *Ewanchuk* for essentially this principle – that the morally innocent must be protected.<sup>45</sup> In the context of sexual assault, the issue is not degree of foreseen consequence, but the kind of knowledge of circumstance, specifically the circumstance of lack of consent, that is required to protect the morally innocent. The Court in *Ewanchuk* explicitly found that the availability of the defence of honest but mistaken belief in consent achieves that goal:

In order to cloak the accused’s actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her

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<sup>43</sup> *R v Creighton*, [1993] 3 SCR 3, [1993] SCJ No 91 (QL).

<sup>44</sup> *Ibid* at 53-54 [citations omitted].

<sup>45</sup> *Ewanchuk*, *supra* note 2 at para 42.

own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions. The statutory definition added to the Code by Parliament in 1992 is consistent with the common law.<sup>46</sup>

In light of such comments, there can be no doubt that the availability of honest but mistaken belief in consent is all that is needed to protect the morally innocent, and consequently, all that is needed to comply with the requirements of the *Charter* in this regard.

More, the element of *mens rea* described in the challenged instruction does not, in fact, protect the morally innocent, or at least, it does not protect only the morally innocent. First, the route to acquittal based on the challenged instruction focuses on the double negative of not knowing that the complainant did not consent. But that is not enough to achieve moral innocence. The law requires that to successfully claim moral innocence, an accused must have taken reasonable steps in the circumstances known to them to have obtained consent through words and actions in advance of sexual touching. The morally innocent must do more than not know the complainant was not consenting, or did not say "no"; they must believe the complainant did say "yes."<sup>47</sup>

Further, the common law and the *Criminal Code* circumscribe the availability of a claim of honest but mistaken belief. To make that claim, the belief cannot be, for instance, based in ambiguous or passive conduct by the complainant. Nor can it be based in the self-induced intoxication of the accused.<sup>48</sup> Failure to respect these and other requirements is a failure to be,

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<sup>46</sup> *Ibid* at paras 45-46 [emphasis added].

<sup>47</sup> Nor is this fundamental problem with the challenged instruction solved by adding in references to recklessness or willful blindness. Even if such lower *mens rea* options are included, the focus is still on the absence of a "no": was the accused reckless or willfully blind about the complainant's lack of consent. The focus, on any proper analysis, needs to be on the belief in the presence of a "yes" in words or actions. Recklessness and willful blindness instructions may be appropriate, in turn with respect to the legitimacy of that belief, but that is a different matter.

<sup>48</sup> *Ewanchuk*, *supra* note 2 at paras 50-51; *Criminal Code*, *supra* note 2, s 273.2. The statutory restriction in s 33.1 of the *Criminal Code* with respect to self-induced intoxication may present separate constitutional challenges, but those do not affect the present argument. Section 33.1 relates to a more general defence where self-induced intoxication creates a state akin to automatism. This relates in turn to the voluntariness of the act, which

in fact, morally innocent. But, unlike the instruction on honest but mistaken belief, the challenged instruction includes no such restrictions. Consequently, the challenged instruction would acquit people who are not morally innocent. It follows, in turn, that the challenged instruction cannot be defended as necessary for the protection of the morally innocent.

Alternatively, if the asymmetrical structure of the offence is theoretically troubling, a legal purist could simply view honest but mistaken belief in consent as the element of *mens rea* that mirrors the *actus reus* element of “without consent.” That honest but mistaken belief in consent is not the subject of any instruction unless there is an air of reality to it does not change its existence as one of the elements of the offence. There is some support for this approach in paragraphs 48 and 49 of *Ewanchuk*, excerpted above, which parallel the *actus reus* element of consent in fact with the *mens rea* element of consent communicated by words or actions in relation to honest mistaken belief.

Whether one views the theoretical structure of the offence as being acceptably asymmetrical, or as being symmetrical but with an element that is only referred to when raised by the evidence, it makes no difference to the error of the challenged instruction.

### C. *Pappajohn*

This understanding of the *mens rea* of sexual assault is further supported by consideration of another case referred to by both *Ewanchuk* and *Robertson*: *R v Pappajohn*.<sup>49</sup> In *Pappajohn*, the accused was convicted of raping a real estate agent in his home, which he had listed for sale. The issue at the Supreme Court of Canada was whether the trial judge erred by not instructing the jury on mistake of fact with respect to whether the complainant consented to the sexual activity. The decision in *Pappajohn* is split, and it is particularly important to begin this analysis with the passage on which *Ewanchuk* relies:

Mistake is a defence...where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed

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nothing in this paper rejects as an element of the offence, and which is very different from the restriction in 273.2 in relation to mistaken belief in consent: see *R v McCaw* 2018 ONSC 3464 and *R v Chan*, 2019 ONSC 783.

<sup>49</sup> *R v Pappajohn*, [1980] 2 SCR 120, [1980] SCJ No 51 (QL) [*Pappajohn*].

perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.<sup>50</sup>

This passage is from a two-judge minority judgement, authored by Dickson J (as he then was). Notably, this passage is in the section of that judgement under the heading “Mistake of Fact.” That section is adopted by McIntyre J writing for the majority: “I am in agreement with that part of [Justice Dickson’s] judgement dealing with the availability as a defence to a charge of rape in Canada of what is generally termed the defence of mistake of fact.”<sup>51</sup> Thus, this passage is part of what is adopted by the majority in *Pappajohn*, and is further endorsed by being cited in *Ewanchuk*.

Importantly, other parts of Dickson J’s minority judgement were not adopted in this way. In particular, the passages before the heading “Mistake of Fact” are not adopted, including the assertion that “intention or recklessness must be proved in relation to all elements of the offence, including absence of consent. This simply extends to rape the same general order of intention as to other crimes.”<sup>52</sup> That is, in *Pappajohn* a description of the element of the offence in essentially the terms set out in the challenged instruction was supported by the minority, and rejected by the majority. The majority adopted mistake of fact, now honest but mistaken belief in consent, and not any further mental element. This decision, explicitly relied on by both *Ewanchuk* and *Robertson*, is clear support for the argument advanced in this article that the challenged instruction is inconsistent with a proper reading of *Ewanchuk*.

#### D. *Park*

In *R v Park*,<sup>53</sup> the case focused, at the Supreme Court, on whether there existed an “air of reality” sufficient to require that the issue of honest but mistaken belief in consent be put before the jury. The complainant had testified that the accused overpowered her despite his awareness of her religious objections to premarital sex; the accused claimed that the complainant had willingly participated in the sexual activity. As with

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<sup>50</sup> *Ibid* at 148, cited in *Ewanchuk*, *supra* note 2 at para 43.

<sup>51</sup> *Pappajohn*, *supra* note 49 at 134.

<sup>52</sup> *Ibid* at 146.

<sup>53</sup> *R v Park*, [1995] 2 SCR 836, [1995] SCJ No 57 (QL) [*Park*].

*Pappajohn*, it is a passage from a minority judgement in *Park* on which the Court relies in *Ewanchuk*:

As with the *actus reus* of the offence, consent is an integral component of the *mens rea*, only this time it is considered from the perspective of the accused. Speaking of the *mens rea* of sexual assault in *Park*, *supra*, at para. 39, L'Heureux-Dubé J. (in her concurring reasons) stated that:

. . . the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying “no,” but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying “yes.”<sup>54</sup>

However, unlike in *Pappajohn*, the majority in *Park* did not adopt the passage on which *Ewanchuk* relies.<sup>55</sup> Thus, it is only when adopted by *Ewanchuk* that this passage becomes law. The principle is elaborated in the next two paragraphs in *Ewanchuk*, cited above in connection with *Creighton*, and again here:

In order to cloak the accused’s actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused’s speculation as to what was going on in the complainant’s mind provides no defence.

For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said “yes” through her words and/or actions. The statutory definition added to the *Code* by Parliament in 1992 is consistent with the common law...<sup>56</sup>

Here, again, the analysis of the *mens rea* focuses on the issue of honest but mistaken belief in consent and not on anything that corresponds to the element purportedly identified by the challenged instruction.

Further, this demonstrates the transition in the law marked by the Court’s decision in *Ewanchuk* to adopt the position it had rejected in *Park*: that the focus of the analysis is not on whether the complainant said “no” (or whether the accused knew she had) but on whether the accused honestly believed that the complainant had said “yes” by words or actions. As the Court of Appeal in *Barton* observed, Parliament changed the *Criminal Code*

<sup>54</sup> *Ewanchuk*, *supra* note 2 at para 45, citing *Park*, *supra* note 53 at para 39.

<sup>55</sup> The majority in *Park* did adopt L'Heureux-Dubé’s judgment, except the section on “Mistake of Fact and Consent,” in which section the passage excerpted in *Ewanchuk* appears: *Park*, *supra* note 53 at paras 1-2.

<sup>56</sup> *Ewanchuk*, *supra* note 2 at paras 46-47 [emphasis in original].

in the 1992 to give effect to this positive view of consent. The offence in *Park*, however, had occurred before those changes, on December 25, 1991. Here, the minority decision of L'Heureux-Dubé' J anticipated the statutory change,<sup>57</sup> described in *Barton* as follows:

[I]t is incontrovertible that Parliament's 1992 Code Amendments on sexual offences contained in Bill C-49 were intended to be substantive in content and material in effect...Bill C-49 was intended to reform the law in Canada, especially on the issue of consent - and did. Parliament explicitly changed the law in Canada on consent from a negative notion to a positive notion of sexual mutuality and agreement. However, a strong substantive definition of consent means little if it is not implemented. As the law on sexual offences changes - statutorily and jurisprudentially - jury instructions must change too.<sup>58</sup>

The focus of the challenged instruction on the negative question of whether the complainant said “no” rather than the positive question of whether the complainant conveyed “yes” though words or actions is, in essence, a hold-over from a legal context that has not existed in statute since 1992, nor in the clear common law of the land since (at least) 1999. In this way, the problem of instructing the jury on an element of the offence that does not exist is compounded by actively misinstructing the jury as to the proper legal focus of the concept of consent.

Put another way, the challenged instruction imports implicitly what *Barton* calls the “ghost element” of resistance.<sup>59</sup> This idea, that we would expect a victim of sexual assault to cry out, or fight, or resist in some way, is one of the myths and stereotypes that continue to “stalk the halls of justice.”<sup>60</sup> In court, the onus is on the Crown to prove the essential elements of a given offence beyond a reasonable doubt; in life and law, the onus is on the one who touches to obtain consent by words or actions before touching. The challenged instruction flies in the face of that onus.

### E. Conclusions About the Cases Behind *Ewanchuk*

Concerns based on reading some sentences in *Ewanchuk* in isolation from the rest of the judgement are inconsistent with the jurisprudential foundations of the case. *Robertson* illustrates that the reading of the elements

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<sup>57</sup> It would be natural to wonder whether and to what extent this minority decision actually influenced the statutory change but that inquiry is beyond the scope of this article.

<sup>58</sup> *Barton*, *supra* note 3 at para 157.

<sup>59</sup> *Ibid* at para 156.

<sup>60</sup> *Ibid* at para 8.



of sexual assault proposed by this article, and inconsistent with the challenged instruction, was not novel to *Ewanchuk*, but was already established law. *Creighton* dismisses the academic desire for perfect symmetry between the *actus reus* and the *mens rea* and reemphasizes the purpose of protecting the morally innocent. *Pappajohn* illustrates that the Supreme Court of Canada had previously rejected a *mens rea* such as the one contained in the challenged instruction. *Park* illustrates the need to focus on consent as a positive, not negative, concept. The cumulative effect of this support from the cases that provide the jurisprudential foundation for *Ewanchuk* is clearly in support of the reading advanced in this article and is opposed to any view of the offence of sexual assault that accords with the challenged instruction.

### F. Jurisprudence – Cases Following *Ewanchuk*

While this article has, so far, focused on the cases that came before and underpinned the lead case, *Ewanchuk*, it is acknowledged that the more usual legal approach is to consider cases after the leading case. However, here, there are surprisingly few cases at the Supreme Court of Canada in which the *mens rea* elements of sexual assault are in issue. Virtually all the cases referring to *Ewanchuk* are focused on other issues: the *actus reus*,<sup>61</sup> the question of what constitutes an “air of reality” in contexts other than sexual assault,<sup>62</sup> concerns about stereotypes in the context of sexual assault but in relation to issues other than the *mens rea*,<sup>63</sup> and various other issues that do not impact the analysis presented here.<sup>64</sup> That said, there are two cases that

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<sup>61</sup> *R v Handy*, 2002 SCC 56 (similar fact evidence); *R v Williams*, 2003 SCC 41 (consent in the context of HIV disclosure); *R v Mabior*, 2012 SCC 47 (effect of fraud, in the context of HIV, on consent); *R v Hutchinson*, 2014 SCC 19 (effect of tampering with condoms on consent).

<sup>62</sup> *R v Cinous*, 2002 SCC 29 (self-defence in the context of murder); *R v Fontaine*, 2004 SCC 27 (automatism in the context of murder); *R v Gunning*, 2005 SCC 27 (whether shooting was accidental); *R v Tran*, 2010 SCC 58 (provocation in the context manslaughter).

<sup>63</sup> *R v GW*, [1999] 3 SCR 597, [1999] SCJ No 37 (QL) (sentencing issue); *R v AG*, 2000 SCC 17 [AG] (scope of appeal); *R v Find*, 2001 SCC 32 (challenge for cause issue); *R v Regan*, 2002 SCC 12 (stay issue); *JW v Canada (Attorney General)*, 2019 SCC 20 (application of criminal definition of sexual assault in context of residential schools class action settlement).

<sup>64</sup> *R v Araujo*, 2000 SCC 65 (availability of Crown appeal in drug crime context); *R v RAR*, 2000 SCC 8 (seriousness of sexual assault in sentencing context); *R v GR*, 2005 SCC

might be seen as potentially helpful, if only in passing or indirectly. One, *JA*, has already been discussed and found unhelpful.

The other potentially useful case is *R v Davis*,<sup>65</sup> a case released only nine months after *Ewanchuk*. *Davis* was concerned with the air of reality test as it relates to the assertion of honest but mistaken belief in consent. In that case, the accused was convicted of sexual assault after persuading several complainants to pose nude for photographs, ostensibly to secure modelling contracts, then threatening to publicly reveal those images. The trial judge did not discuss the issue of an honest but mistaken belief in consent in his reasons, and it was argued on appeal that this can be deemed a failure to consider the defence and an error of law. Lamer CJ, writing for the Court, found that there was no air of reality to ground such a defence on the facts of the case and thus no reversible error in not explicitly negating it in the reasons.

While the decision in *Davis* does not directly discuss the issue of *mens rea* outside of the context of an honest but mistaken belief in consent, the Court's reasoning can be seen as instructive in a number of respects. In this context, it should be noted that the panels in the two cases are overwhelmingly similar. The seven judges who sat for *Davis* were all part of the panel of nine that sat for *Ewanchuk*. The author of the unanimous decision in *Davis*, Lamer CJ, concurred in the majority decision of Major J in *Ewanchuk*. Only Justices Iacobucci and Bastarache were present for *Ewanchuk*, and not for *Davis*, and they both concurred in Major J's majority decision.<sup>66</sup> It follows that insight into the Court's thinking in *Ewanchuk* may be gleaned from its approach to a related though distinct issue in *Davis*. In *Davis*, Lamer CJ specifically identified a distinction between a "belief in consent" and an "honest but mistaken belief in consent,"<sup>67</sup> confirming the settled standard for the application of the defence. Moreover, the Chief

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45 (whether sexual assault an included offence in incest); *R v Quesnelle*, 2014 SCC 46 (disclosure issues).

<sup>65</sup> *R v Davis*, [1999] 3 SCR 759, [1990] SCJ No 67 [*Davis*].

<sup>66</sup> While we have referred to Major J's decision as the majority decision, it should be noted that Justices L'Heureux-Dubé and Gonthier generally agreed with Major J, and McLachlin J agreed with Major J. The minority judgements in *Ewanchuk* were more about emphasizing the need to reject stereotypical thinking as the underpinning of a wrongheaded claim to implied consent than broader disagreements about the nature of the elements of the offence of sexual assault.

<sup>67</sup> *Davis*, *supra* note 65 at para 84 [emphasis in original].

Justice explained that that defence “is simply a denial of the *mens rea* of sexual assault.”<sup>68</sup>

Notably, the *mens rea* was not discussed as anything other than the absence of an honest but mistaken belief in consent; having found the necessary air of reality did not exist to give rise to the defence, the Court did not then consider separately whether the Crown had proved that the accused “knew” that the complainants did not consent. The analysis of the honest but mistaken belief in consent defence appears to have covered the field. This is consistent with the position articulated in this article: the accused’s knowledge of a lack of consent is not an element of the offence of sexual assault, and the Crown accordingly need not prove such knowledge, and need only address the accused’s mental state with respect to the complainant’s lack of consent in cases in which the issue of honest but mistaken belief in consent is properly in play, and according to the settled jurisprudence on that issue.

That said, there is no case of which the authors are aware, subsequent to *Ewanchuk*, in which the Supreme Court of Canada has directly and explicitly revisited the fundamental definition of the *mens rea* for the offence of sexual assault. It follows that, as is generally accepted in any event, *Ewanchuk* remains the leading and binding authority on the issue. And that authority, read as this article suggests it should be, is contrary to the use of the challenged instruction.

## VII. THE EFFECT OF THE CHALLENGED INSTRUCTION

As the preceding legal analysis has demonstrated, it simply is not an element of the offence of sexual assault that the accused know that the complainant was not consenting to the sexual activity in question. It follows that the Crown does not need to prove it. Where there is an air of reality to raise it, the Crown must disprove an honest mistaken belief in consent, but that is a very much different element and issue.<sup>69</sup>

On its face, it must be an error to tell a jury that the Crown must prove something that the Crown does not need to prove. Further, the only logical consequence of adding an element that does not exist in law is that some number of accused who otherwise would, and should, have been convicted

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<sup>68</sup> *Ibid* at para 80.

<sup>69</sup> *Ewanchuk*, *supra* note 2 at para 63.

were, instead, acquitted. The logic of this is fairly straight-forward, given that juries are required to come to one of two verdicts: guilty or not guilty.<sup>70</sup> Since those two verdicts are in a zero-sum relationship, only three results are possible from the use of the challenged instruction: it could increase, decrease, or have no effect on the number of convictions. Two of those possibilities can be excluded. It is not logically possible that adding an additional element could increase the number of convictions. Watt's instruction Final 271 lists four elements (including the one challenged here). If all four are proven, then the three unchallenged elements necessarily have been proven along with the one challenged element; no one convicted on a charge employing the challenged instructions would have been acquitted if it were omitted. The first possibility must therefore be excluded. Moreover, it is difficult to believe that the challenged instruction has no effect at all on the general result across all sexual assault jury trials. At issue is a standard instruction, purporting to be necessary in every case and describing what it calls essential for there to be a conviction. To suggest that the addition of an extra requirement in such circumstances would have no effect in any trial requires a belief that juries are universally not listening to, or not bothering to follow, a judge's instructions. We must therefore exclude the third possibility, unless we are to conclude that charging a jury at all is wholly unnecessary.

It follows, then, that the result of including the challenged instruction is to decrease convictions.<sup>71</sup> It must be concluded that some number of juries that found beyond a reasonable doubt that the accused had intentionally touched the complainant in a sexual manner without consent, and so should have convicted, instead acquitted because they had a

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<sup>70</sup> Verdicts such as *autrefois* or not criminally responsible do not engage the issue addressed in this article and can be ignored for present purposes. Similarly, there are some cases in which it might be available to a jury to convict on the lesser included offence of assault *simpliciter*, but that decision would necessarily hinge on whether or not the jury found the force applied without consent to be of a sexual nature. It would not, absent truly exceptional circumstances, turn on the issue of lack of consent or mistaken belief in consent and, therefore, can also be ignored for present purposes. The question of how to deal with exceptional cases could, if necessary, be addressed after the proper approach in ordinary circumstances is established. Finally, the possibility of a hung jury is not relevant here, since that is not a verdict at all and suggests a retrial (subject to the Crown's discretion not to proceed) to reach a verdict.

<sup>71</sup> For juries whose judges faithfully followed the instructions in Watt's, this will follow in cases in which honest but mistaken belief in consent was not raised; for juries whose judges followed the CJC instruction, this will follow in all cases.

reasonable doubt that the accused knew the complainant was not consenting. Accused who would properly be convicted without the challenged instruction are being, instead, acquitted.

It should also be noted that this is not necessarily a problem restricted to jury trials. Certainly, jury trials are the main focus of any problem with standard jury instructions, but it should be remembered that the same judges who sit for jury trials and read these instructions to juries over and over again, trial after trial, will also sit on a large number of sexual assault trials without a jury, judge alone. It is not difficult to imagine that they will be influenced in their own thinking about conviction and acquittal by the instructions they have repeatedly given juries. Nor is it difficult to imagine a judge turning to a source like Watt's or the CJC instructions as part, in essence, of the process of self-instruction. To the extent that judges sitting alone are influenced in thought directly or indirectly by the challenged instruction, they will be influenced in the direction of (improper, unjust) acquittal.

If, as this article argues, it is an error to give or follow the challenged instruction, then those acquittals, by jury or by judge alone, are improper. Virtually all jury trials that deal with sexual assault concern the more serious forms of sexual assault, what formerly was called rape, as do many judge alone trials in the Superior Courts. So, to put it bluntly, the consequence of improperly including or relying on the challenged instruction is that rapists, in some number, have been, and continue to be, improperly acquitted.

The scale of the problem is difficult or impossible to know, given the secrecy that Canadian law imposes on jury deliberations. It is not permitted to ask jurors whether any given acquittal is the result of the challenged instruction. It is worth noting, however, that the element added by the challenged instruction is a difficult element to prove. It is a mental element, which is always difficult to prove. Moreover, it is a mental element about another person's mental state, increasing that difficulty. The instruction is phrased in the negative; negatives are more difficult than positives to prove. Finally, it uses the word "know," which is a stronger mental state in common usage than "suspected" or "believed." Indeed, Watt's *Manual* italicizes the word "know," essentially telling the judge to emphasize it to the jury. This effectively creates a higher burden for the Crown in cases without an air of reality to support a defence of honest but mistaken "belief" in consent. Logically, the more difficult something is to prove, the less likely

it is to be proved; the assertion that the challenged instruction imposes a particularly onerous burden on the Crown supports a real concern that significant numbers of verdicts are thereby affected. It is not necessary to rely on the “one is too many” form of rhetoric to suggest that the problem represented by the challenged instruction is significant and pressing in terms of numbers of cases.

It is also important to consider the broader social consequences of getting this wrong. L’Heureux-Dubé J often wrote explicitly about the importance of Parliament’s objectives in reframing the law in 1992. For instance, in *Park*, she said that “the primary concern animating and underlying the present offence of sexual assault is the belief that women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in.”<sup>72</sup> Elsewhere, she specifically identified one objective of the legislative and jurisprudential changes made to the law of sexual assault as “the need to affirm the principles of equality and human dignity in our criminal law by addressing the problems of myths and stereotypes about complainants in sexual assault cases.”<sup>73</sup> Nearly two decades later, the Alberta Court of Appeal identified the same sorts of concerns in *Barton*, finding it “an affront to the will of Parliament” that the same problems continue.<sup>74</sup>

Professor Lucinda Vandervort has argued that “erroneous interpretations and applications of the law of consent” combined with police and prosecutorial discretion predicated on such mistakes, continue to reinforce and perpetuate those myths and stereotypes.<sup>75</sup> Moreover, Vandervort argues, an “approach that gives ‘belief in consent’ a pivotal role in analysis of the evidence will tend to evoke the old paradigms and will

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<sup>72</sup> *Park*, *supra* note 53 at para 42.

<sup>73</sup> AG, *supra* note 63 at para 1. For the historical development of the law of rape/sexual assault in Canada, and the policy context of the 1992 revisions to the *Criminal Code*, see Sheila McIntyre, “Redefining Reformism: The Consultations that Shaped Bill-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; Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007) 52 McGill LJ 243; Lucinda Vandervort, “Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory” (2012) 23 Colum J Gender & L 395 [Vandervort, “Affirmative Consent”]; Janine Benedet, “Sexual Assault Cases at the Alberta Court of Appeal: The Roots of Ewanchuk and the Unfinished Revolution” (2014) 52 Alta L Rev 127.

<sup>74</sup> *Barton*, *supra* note 3 at para 9.

<sup>75</sup> Vandervort, “Affirmative Consent,” *supra* note 73 at 438.

often result in truncation of the analysis of mens rea.”<sup>76</sup> In this context, it is particularly significant that the standard jury instruction for sexual assault, in cases lacking an air of reality for an assertion of honest but mistaken belief in consent, has not changed significantly in the last quarter century despite intervening changes in social and jurisprudential awareness of the outdated normative assumptions that informed the historical law of rape. It must therefore be recognized that continuing to use the challenged instruction, by incorrectly articulating the elements required to be proved for a conviction, undermines the legislative intention behind the *Criminal Code* provisions that it purports to explain.

### VIII. CONCLUSION

Change is hard. Change is slow. Parliament attempted change in the 1992 amendments to the *Criminal Code*. *Ewanchuk*, embracing what had previously been a dissent in *Park*, embraced change.

It is time for the change initiated by Parliament in 1992 to reach the day to day life of Canadian courts. Long past time, really. For over a quarter of a century, the criminal justice system has been improperly acquitting people of one of the most repugnant of crimes, sexual assault. And, as *Barton* points out, sexual assault is largely a gender based crime.<sup>77</sup> Overwhelmingly, the accused are men, and the complainants are women. It follows that, to the extent that (as this article argues) we have been improperly acquitting some accused, we have been acquitting men at the expense of women.

There is no basis in statute or common law to require the Crown to prove what the challenged instruction purports to require. More, by focusing on consent as a negative concept, the challenged instruction invites juries and judges to follow a stereotypical and prejudicial kind of thinking, in a way that adds insult to the injury of the improper acquittal. The challenged instruction is not just an error, it is a wrong.

It is, no doubt, difficult to face the idea that Canadian courts have been misinstructing juries for 25 years or more. No judge, no lawyer, no Canadian, will find that a comfortable idea. “We’ve always done it this way” and “we can’t all have been doing it wrong” are twin sides of the inertia that has been frustrating the changes that *Barton* reminds us Parliament sought

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<sup>76</sup> Vandervort, “Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault” (2004) 42 *Osgood Hall LJ* 625 at para 44.

<sup>77</sup> *Barton*, *supra* note 3 at para 8.

to make in 1992. But, inertia is not a legal argument. Inertia is an argument for laziness or cowardice.

Over the last year or so, society has experienced significant changes in attitudes around sexual assault and has seen more open and louder challenges to the widespread complacency with which inappropriate sexual behaviour has been viewed. Cultural change is, of itself, also not a legal argument. However, cultural change might help us find the courage to face the legal reality that has been avoided for too long.

There are no doubt many other changes to the standard jury charge for sexual assault that are needed, but none so much as the core error of law that this article identifies. What should the change be? What should the charge be? As far as the one problem addressed by this article is concerned, and absent an air of reality to the defence of an honest but mistaken belief in consent, the simple charge used in *Robertson* is as good as any that can be suggested: “the only intent, the only mental element you need to consider is the accused’s intention to touch the complainant.” Canadian courts should start using it.



## Appendix 1 – Watt’s Final 271 and Final 65 – D

### FINAL 271

#### SEXUAL ASSAULT (*CODE*, s. 271)<sup>1</sup>

[1] (*NOA*) is charged with sexual assault. The formal charge reads:

*(Read applicable parts of indictment or count)*

**(Where there is an issue whether the offence ever occurred, Final 76 should be given before [2].)**

[2] For you to find (*NOA*) guilty of sexual assault, Crown counsel must prove *each* of these essential elements beyond a reasonable doubt:

- i. that (*NOA*) *intentionally* applied force to (*NOC*);
- ii. that (*NOC*) did *not* consent to the force that (*NOA*) (*intentionally*)<sup>2</sup> applied;
- iii. that (*NOA*) *knew*<sup>3</sup> that (*NOC*) did *not* consent to the force that (*NOA*) (*intentionally*) applied; and
- iv. that the force that (*NOA*) (*intentionally*) applied took place in circumstances of a sexual nature.

If Crown counsel has *not* satisfied you beyond a reasonable doubt of *each* of these essential elements, you must find (*NOA*) *not* guilty of sexual assault.

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<sup>1</sup> This instruction covers *only* assault as defined in s. 265(1)(a).

<sup>2</sup> The *parenthetical* reference (*intentionally*) here and elsewhere may be unnecessary in many cases.

<sup>3</sup> Where *apprehended consent* is raised, this element should begin: “that (*NOA*) did *not* honestly believe that (*NOC*) consented ...”.

If Crown counsel *has* satisfied you beyond a reasonable doubt of *each* of these essential elements, you must find *(NOA)* *guilty* of sexual assault.

[3] Each essential element may be made into a question for you to consider carefully and answer.

...

**[6] Did *(NOA)* know that *(NOC)* did *not* consent to the force that *(NOA)* (*intentionally*) applied?<sup>4</sup>**

This element requires Crown counsel to prove knowledge, a state of mind, *(NOA)*'s state of mind. Crown counsel must prove beyond a reasonable doubt that *(NOA)* *knew* that *(NOC)* did *not* consent to the force that *(NOA)* (*intentionally*) applied. To “know” something is to be aware of it, at the time you do it.

***(Where Crown counsel relies on more than one basis to establish knowledge, add [6-A]; the applicable basis, ([6-B] (actual knowledge), [6-C] (recklessness) or [6-D] (wilful blindness)); followed by [6-E].)***

[6-A] There is more than one way for Crown counsel to prove that *(NOA)* *knew* *(NOC)* did not consent to the force that *(NOA)* (*intentionally*) applied.

***(Where Crown counsel relies on actual knowledge:)***

[6-B] *(NOA)*'s knowledge that *(NOC)* did *not* consent is proven if you are satisfied beyond a reasonable doubt that *(NOA)* was actually aware that *(NOC)* did *not* consent to the force that *(NOA)* (*intentionally*) applied.

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<sup>4</sup> Where *apprehended consent* is raised, this instruction should read: “Did *(NOA)* *honestly* believe that *(NOC)* consented?” followed by the appropriate Final 65-C or 65-D, including the consequences of each available finding. Later instructions should be renumbered accordingly.

***(Where Crown counsel relies on recklessness,  
add:)***

[6-C] *(NOA)*'s knowledge that *(NOC)* did not consent is proven if you are satisfied beyond a reasonable doubt that *(NOA)* was aware that there was a risk that *(NOC)* was *not* consenting to the force that *(NOA)* applied, but *(NOA)* went ahead anyway, *not* caring whether *(NOC)* consented or not. In other words, *(NOA)* was aware of the risk that *(NOC)* did not consent, but went ahead anyway and *(intentionally)* applied force, despite the risk.

***(Where Crown counsel relies on wilful blindness,  
add:)***

[6-D] *(NOA)*'s knowledge that *(NOC)* did not consent is proven if you are satisfied beyond a reasonable doubt that s/he knew s/he should inquire whether *(NOC)* consented to the force that *(NOA)* *(intentionally)* applied, but did *not* make the inquiry because s/he did not want to know the truth about *(NOC)*'s consent. In other words, *(NOA)* deliberately failed to inquire about *(NOC)*'s consent even though s/he knew that there was reason to do so.

***(In all cases where more than one basis of knowledge is relied  
on, add:)***

[6-E] To prove that *(NOA)* *knew* that *(NOC)* did *not* consent, Crown counsel does *not* have to prove each basis of knowledge that I have described. One, any one, is enough. All of you don't have to agree that knowledge has been established on the same basis, as long as everyone is sure, on one basis or another, that Crown counsel has proven beyond a reasonable doubt that *(NOA)* knew that *(NOC)* did *not* consent to the force that *(NOA)* *(intentionally)* applied

*(In all cases)*

To determine *(NOA)*'s state of mind, what s/he *knew* about *(NOC)*'s consent or lack of it, you should consider all the evidence. Take into account:

- what *(NOA)* and *(NOC)* did/did not do
- how *(NOA)* and *(NOC)* did/did not do it
- what *(NOA)* and *(NOC)* said/did not say.

You should look at their words and conduct before, at the time and after *(NOA)* (*intentionally*) applied force to *(NOC)*. Take into account the nature of what happened or didn't happen between *(NOA)* and *(NOC)*, any words/gestures that may have accompanied it (including any alleged threats) and anything else that indicates *(NOA)*'s state of mind at the time s/he (*intentionally*) applied force to *(NOC)*.

*(Review relevant evidence and relate to issue)*

If you have a reasonable doubt that *(NOA)* *knew* that *(NOC)* did *not* consent to the force that *(NOA)* (*intentionally*) applied, you must find *(NOA)* *not* guilty. Your deliberations would be over.

If you *are* satisfied beyond a reasonable doubt that *(NOA)* *knew* that *(NOC)* did *not* consent to the force that *(NOA)* (*intentionally*) applied, you must go on to the next question.

...

**Notes on Use**

**Section 271 creates the offence of sexual assault. Somewhat unusually, sexual assault is both a crime itself and an essential element of the more serious offences for which ss. 272 and 273 provide.**

**In the second paragraph, the offence is divided into four elements:**

- i. application of force;**
- ii. absence of consent;**
- iii. knowledge of absence of consent; and**
- iv. circumstances of a sexual nature.**

**Other divisions are possible.**

...

**The third element, discussed in paragraph [6], also has to do with state of mind, but this time it is D's state of mind. As the instruction points out, P may establish this element by proof of actual knowledge, recklessness or wilful blindness. Any inapplicable basis should be deleted to avoid confusion. Where more than one basis remains, an instruction about unanimity, like [6-E] is advisable. Before the evidentiary review, jurors should be reminded how they can determine D's state of mind from the evidence introduced at trial.**

**Knowledge of the absence of consent is the essential element of P's case to which any claim of *apprehended consent* relates. It follows that instructions on apprehended consent should be included here and the issue left for the jurors to decide. Final 65-D is the appropriate instruction. It is critical that jurors understand that there is *no* burden on D to prove apprehended consent. The onus is on P to negate apprehended consent and the final instructions should leave no doubt about it.**

...

**FINAL 65-D**

**MISTAKEN BELIEF IN  
(APPREHENDED) CONSENT<sup>5</sup>**

**(CODE, s. 273.2)**

[1] It is *(NOA)*'s position that s/he *honestly* believed that *(NOC)* voluntarily agreed to participate in the sexual activity with which *(NOA)* is charged (or, *specify*).

[2] *(NOA)* does *not* have to prove that s/he *honestly* believed that *(NOC)* voluntarily agreed to participate in the sexual activity with which s/he is charged (or, *specify*). It is Crown counsel's task to prove beyond a reasonable doubt that *(NOA)* had no such belief. If you have a reasonable doubt about whether *(NOA)* *honestly* believed that *(NOC)* consented to the sexual activity with which *(NOA)* is charged, you must find *(NOA)* *not* guilty. Your deliberations would be over.

[3] A belief is a state of mind, *(NOA)*'s state of mind. To determine whether *(NOA)* *honestly* believed that *(NOC)* voluntarily agreed to participate in the sexual activity with which *(NOA)* is charged (or, *specify*), you should consider *all* the circumstances surrounding that activity. Take into account

- *what (NOA) and (NOC) did or did not do;*
- *how (NOA) and (NOC) did or did not do it; and*
- *what (NOA) and (NOC) said or did not say.*

[4] You should look at their words and conduct before, at the time, and after the sexual activity (or, *specify*) occurred. Take into account the *nature* of what happened or didn't happen between *(NOA)* and *(NOC)*, any *remarks* or *gestures* that either one made

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<sup>5</sup> The precise relationship between apprehended consent under ss. 273.2 and 265(4) is unclear. This is the specific instruction that applies to the sexual assault offences in ss. 271, 272 and 273. The general instruction is Final 65-A.

or attempted at the time of the activity (or, *specify*), and any other circumstance that indicates what (*NOA*) *honestly* believed at the time of this sexual activity (or, *specify*).

[5] (*NOA*) must *honestly* believe that (*NOC*) voluntarily agreed to participate in the sexual activity charged (or, *specify*). An honest belief cannot be based on (*NOA*)'s intoxication. There is no honest belief if (*NOA*) saw the risk that (*NOC*) would *not* voluntarily agree to participate in the sexual activity, but went ahead anyway in spite of that risk. Similarly, there can be no honest belief if (*NOA*) was aware that s/he needed to find out whether (*NOC*) would agree to participate in this activity, but did nothing about it because (*NOA*) didn't want to know the truth. Nor can there be an honest belief in (*NOC*)'s voluntary agreement to participate in the sexual activity unless (*NOA*) took the steps a *reasonable* person would take in the circumstances as (*NOA*) knew them, to find out whether (*NOC*) agreed, to participate in the activity.

[6] (*NOA*)'s belief must be honest, but it does *not* have to be reasonable. The *reasonableness* of (*NOA*)'s belief, however, may be an important factor for you to consider in deciding whether s/he *actually* had the honest belief s/he claims. For example, if you consider that (*NOA*)'s belief was reasonable, one that a reasonable person would have in the same circumstances, you may think that is a factor that favours a conclusion that (*NOA*) *honestly* held that belief. On the other hand, if you consider (*NOA*)'s belief was *unreasonable*, one that no reasonable person would have in the circumstances, you may think that is a factor that favours a conclusion that his/her belief was *not* honestly held.

[7] Look at *all* the circumstances in deciding this issue. Do not focus on only one and ignore the rest. Use your good common sense.

*(Review relevant evidence and relate to  
issue)*

[8] If you have a reasonable doubt whether *(NOA)* honestly believed that *(NOC)* voluntarily agreed to participate in the sexual activity with which *(NOA)* is charged (or, *specify*), you must find *(NOA)* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *(NOA)* did not honestly believe that *(NOC)* voluntarily agreed to participate in the sexual activity with which *(NOA)* is charged (or, *specify*), you must (*specify applicable consequence*).

**Notes on Use**

**The scope of this “defence” of mistaken belief in consent requires consideration of several statutory provisions.**

**This instruction is limited to *sexual assault* offences under ss. 271, 272, and 273 of the *Criminal Code*. Consent in sexual assault cases means V’s voluntary agreement to engage in the sexual activity that forms the subject-matter of the charge: *Criminal Code*, s. 273.1(1). In the result, mistaken belief in consent *requires* an honest belief that V voluntarily agreed to participate in the sexual activity charged, as paragraph [1] instructs the jurors.**

**Section 273.1(2) makes it clear that consent obtained in any circumstances listed there is legally ineffectual. Section 273.1(3) has the effect of converting s. 273.1(2) into a series of vitiated consents that are *not* exhaustive of the circumstances in which consent may be legally flawed. For its part, s. 273.2 limits mistaken belief in consent by declaring legally ineffectual any apprehended consent based on listed sources of belief or not reasonably grounded. When all is said and done, the**



consent about which D holds a mistaken belief must not be one that falls outside s. 273.1(1), or is vitiated by s. 273.1(2) or the residual effect of s. 273.1(3). The mistaken belief in consent must *not* be extinguished by s. 273.2.

This specimen starts out with a statement of D's position: mistaken belief in consent. The instruction explains what is required. D must *honestly* believe that V voluntarily agreed to participate in the sexual activity charged. Despite the focus of the instruction on D's state of mind, more accurately on his or her belief, rather than on the essentials of consent, it may be prudent to expand paragraph [1] or add as separate paragraphs the substance of paragraphs [2] and [3] of Final 65-B to ensure adequate understanding of what amounts to consent.

The second paragraph is critical because it assigns the burden and expresses the standard of proof required. Whether in closing argument, final instructions, or both, someone will refer to mistaken belief in consent whether expressly or in other terms as a "defence". It would not be illogical or unreasonable for jurors to think that for a "defence", the defence has to prove something. Paragraph [2] puts paid to any such conclusion.

Specific references to the subject-matter of consent (voluntary agreement to participate in the sexual activity charged) aside, the third and fourth paragraphs are duplicates of the same paragraphs in Final 65-C, and require no further comment.

The fifth paragraph explains to jurors the effect of *Code* s. 273.2. It should be given when there is an evidentiary basis to put apprehended consent in play,

as well as evidence that *requires* jurors to decide whether the belief D claims is flawed under s. 273.2. The vitiating factors include the failure to take reasonable steps to determine whether V was voluntarily agreeing to participate in the charged sexual activity, and a belief rooted in self-induced intoxication, recklessness, or wilful blindness. Each vitiating element is explained in plain language.

Paragraph [6] returns to the nature of D's belief: the belief must be *honestly* held, but need *not* be reasonable. But reasonableness or its lack plays a role, as the paragraph explains before the instruction returns to an emphasis on a consideration of *all* the evidence to resolve the apprehended consent issue.

## Appendix 2 – CJC Instruction

### Offence 271: Sexual Assault

Note<sup>6</sup>

Note<sup>7</sup>

Note<sup>8</sup>

(s. 271)

**(Last revised June 2018)**

*(NOA) is charged with sexual assault. The charge reads:*

*(Read relevant parts of indictment or count.)*

***You must find (NOA) not guilty of sexual assault unless the Crown has proved beyond a reasonable doubt that (NOA) is the person who committed the offence on the date and in the place described in the indictment.<sup>9</sup> Specifically, the Crown must prove each of the following essential elements of the offence beyond a reasonable doubt:***

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<sup>6</sup> This instruction does not address cases in which assault as an included offence is a live issue. In cases where the jury has to be instructed on the included offence of assault, this instruction will have to be modified accordingly.

<sup>7</sup> This instruction uses the language of “touching” rather than “force” to make it consistent with the language of ss. 151-153 of the *Criminal Code*. This language also avoids the potential for inconsistent verdicts: See: *R v Tremblay*, 2016 ABCA 30, 334 CCC (3d) 520; *R v S.L.*, 2013 ONCA 176, 300 (3d) 100; and *R v Tyler*, 2016 ONCA 599. In cases involving violence, it may be appropriate to revert to the language of “force”.

<sup>8</sup> Sexual offences underwent major revisions in the *Criminal Code* in 1983 (and 1992). For offences that are alleged to have occurred before 1983, instructions must conform with the law as it then stood (e.g., rape, indecent assault, etc.).

<sup>9</sup> Where identity is an issue, remember to include any further instructions that may be relevant (e.g., eyewitness identification, alibi, similar fact, etc.). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the

1. That (*NOA*) touched (*NOC*) directly or indirectly;
2. That the touching by (*NOA*) was intentional;
3. That the touching by (*NOA*) took place in circumstances of a sexual nature;
4. That (*NOC*) did not consent to the touching by (*NOA*); and
5. That (*NOA*) knew that (*NOC*) did not consent to the touching by (*NOA*).

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find (*NOA*) not guilty of sexual assault.

If you are satisfied beyond a reasonable doubt of all these essential elements [and you have no reasonable doubt<sup>10</sup> after considering the defence(s) (*specify defences*) about which I will instruct you], you must find (*NOA*) guilty of sexual assault.

I now want to remind you not to approach the evidence with unwarranted assumptions as to what is or is not sexual assault, what is or is not consent, what kind of person may or may not be the complainant of a sexual assault, what kind of person may or may not commit a sexual assault, or what a person who is being, or has been, sexually assaulted will or will not do or say. There is no

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time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R v B(G)*, [1990] 2 SCR 3.

<sup>10</sup> Insert the bracketed words if appropriate. This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder or automatism.

typical victim or typical assailant or typical situation or typical reaction. My purpose in telling you this is not to support a particular conclusion but to caution you against reaching conclusions based on common misconceptions.

You must approach the evidence with an open mind and without preconceived ideas. You must make your decision based solely on the evidence and in accordance with my instructions on the law.

***To determine whether the Crown has proved the essential elements, consider the following questions:***

...

***Fifth – Did (NOA) know that (NOC) did not consent to the sexual activity in question?<sup>11</sup> [CJC Note 11]***

The Crown must prove beyond a reasonable doubt that (NOA) was aware that (NOC) did not consent to the sexual activity in question.

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<sup>11</sup> On one interpretation of *R v Ewanchuk*, [1999] 1 SCR 330, knowledge of the accused (or recklessness or wilful blindness) that there was no consent is a component of the *mens rea* that the Crown must prove in every sexual assault case. See also *R v JA*, 2011 SCC 28 at para 24. This is the approach taken here. However, the other possible interpretation of *Ewanchuk*, raised as a question in *R v Barton*, 2017 ABCA 216 at para 239, is that intent to touch is the only requirement for *mens rea*, except in those cases where there is an air of reality to the defence of honest belief in consent, and then knowledge becomes a component of the *mens rea*. Otherwise, the argument goes, the Crown would carry the burden of disproving honest belief in consent even where it is not a live issue (either because it was not raised or does not meet the air of reality threshold). See the suggested jury instruction on the latter approach at footnote 105 of *Barton*: “If you are satisfied that the Crown has proven beyond a reasonable doubt that the complainant did not consent to the sexual activity, you should have little difficulty in concluding that the accused knew or was wilfully blind to the fact that the complainant was not consenting to the sexual activity in question or was reckless and chose to take the risk.”

To prove that *(NOA)* was aware of *(NOC)*'s lack of consent, the Crown must prove one of the following<sup>12</sup>[CJC Note 12] :

1. that *(NOA)* actually knew that *(NOC)* did not consent to the sexual activity in question; or
2. that *(NOA)* knew there was a risk that *(NOC)* did not consent to the sexual activity in question and *(NOA)* proceeded in the face of that risk; or
3. that *(NOA)* was aware of indications that *(NOC)* did not consent to the sexual activity in question, but deliberately chose to ignore them because *(NOA)* did not want to know the truth.

Any one of these is sufficient to establish *(NOA)*'s awareness of *(NOC)*'s lack of consent. You do not all have to agree on the same one. If each of you is satisfied about any one of them beyond a reasonable doubt, the Crown will have proved the essential element of knowledge.

*Where there is an air of reality to the defence of honest but mistaken belief in consent, add this instruction:*

*(NOA)*'s position is that s/he was unaware that *(NOC)* did not consent. In fact, it is his/her position that s/he honestly believed that *(NOC)* communicated his/her consent to the sexual activity in question.

A belief is a state of mind, in this case, *(NOA)*'s state of mind. Ask yourselves whether *(NOA)* honestly believed that *(NOC)* effectively said yes through his/her words or actions.

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<sup>12</sup> See: *R v JA*, 2011 SCC 28 at para 24.

A belief by the person charged that the complainant, in his/her own mind, wanted him/her to touch him/her but did not express that desire, is not a defence. Mere speculation on the part of the person charged as to what was going on in the complainant's mind provides no defence .

To determine whether *(NOA)* honestly believed that *(NOC)* consented to the sexual activity in question, you must consider all the circumstances surrounding that activity. Take into account any words or gestures, whether by *(NOA)* or *(NOC)*, and any other indication of *(NOA)*'s state of mind at the time.

*(NOA)* must honestly believe that *(NOC)* communicated his/her consent to the sexual activity in question. An honest belief cannot be based on *(NOA)*'s self-induced intoxication . There is no honest belief if *(NOA)* saw a risk that *(NOC)* would not consent to the physical contact, but went ahead anyway despite that risk. Similarly, there can be no honest belief if *(NOA)* was aware of indications that *(NOC)* did not consent, but deliberately chose to ignore them because *(NOA)* did not want to know the truth.

Nor can there be an honest belief in *(NOC)*'s consent to the physical contact unless *(NOA)* took reasonable steps in the circumstances known to *(NOA)* at the time to find out whether *(NOC)* consented. In order to determine whether *(NOA)* took reasonable steps, first determine what were the circumstances known to *(NOA)*. Then ask yourselves whether a reasonable person with that knowledge would make further inquiries to ensure *(NOC)* was consenting. If the answer is yes, ask whether *(NOA)* made those inquiries. If s/he did not, then s/he cannot claim s/he honestly believed *(NOC)* was consenting.

If a reasonable person would not have made further inquiries in the circumstances known to *(NOA)*, *(NOA)* may claim s/he honestly believed *(NOC)* was consenting. What a reasonable person would do depends entirely on the circumstances of the case.

*(NOA)*'s belief must be honest, but it does not have to be reasonable. However, you must consider whether there were reasonable grounds for *(NOA)*'s belief; the presence or absence of reasonable grounds may help you decide whether *(NOA)*'s belief was honest. Look at all the circumstances in deciding this issue. You must consider all the evidence, including anything said or done in the circumstances.

*(NOA)* does not have to prove that s/he honestly believed that *(NOC)* consented to the physical contact. Rather, the Crown must prove beyond a reasonable doubt that *(NOA)* had no such belief.<sup>1</sup>

*(Review relevant evidence and relate to issue.)*

Unless you are satisfied beyond a reasonable doubt that *(NOA)* knew that *(NOC)* did not consent (or, that *(NOA)* did not honestly believe that *(NOC)* consented)<sup>13</sup>[CJC Note 13] to the physical contact in question, you must find *(NOA)* not guilty.

If you are satisfied beyond a reasonable doubt that *(NOA)* knew that *(NOC)* did not consent (or, that *(NOA)* did not honestly believe

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<sup>13</sup> Include the bracketed words if the jury has been instructed on mistaken belief in consent.



that *(NOC)* consented)<sup>14</sup>[CJC Note 14] to the sexual activity in question, you must find *(NOA)* guilty.

You must not find *(NOA)* guilty of sexual assault unless you are satisfied beyond a reasonable doubt:

1. That *(NOA)* touched *(NOC)*, directly or indirectly; and
2. That *(NOA)* intentionally touched *(NOC)*; and
3. That the touching by *(NOA)* took place in circumstances of a sexual nature; and
4. That *(NOC)* did not consent to the touching by *(NOA)*; and
5. That *(NOA)* knew that *(NOC)* did not consent or *(NOA)* did not honestly believe that *(NOC)* consented)<sup>15</sup>[CJC Note 15] to the touching by *(NOA)*).

If any one of these essential elements has not been proved beyond a reasonable doubt, [or if you have a reasonable doubt with respect to *(specify defence)*] your verdict must be not guilty.

You must find *(NOA)* guilty of sexual assault if you are satisfied beyond a reasonable doubt:

1. That *(NOA)* touched *(NOC)*, directly or indirectly; and
2. That *(NOA)* intentionally touched *(NOC)*; and
3. That the touching by *(NOA)* took place in circumstances of a sexual nature; and
4. That *(NOC)* did not consent to the touching by *(NOA)*; and

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<sup>14</sup> Include the bracketed words if the jury has been instructed on mistaken belief in consent.

<sup>15</sup> Include the bracketed words if the jury has been instructed on mistaken belief in consent.

5. That (NOA) knew that (NOC) did not consent (or, (NOA) did not honestly believe that (NOC) consented)<sup>16</sup>[CJC Note 16] to the touching by (NOA).

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<sup>16</sup> Include the bracketed words if the jury has been instructed on mistaken belief in consent.