File No. 37687

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Respondent on C61097/
Appellant on C61110)

- and –

DOUGLAS MORRISON

Respondent
(Appellant on C61097/
Respondent on C61110)

- and –

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ATTORNEY GENERAL OF ALBERTA
ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF QUEBEC
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Interveners

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

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APPELLANT'S FACTUM

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PART I: STATEMENT OF FACTS

A. Overview

1. This appeal concerns the constitutionality of two statutory provisions in relation to the offence of child luring for the purpose of facilitating the commission of a sexual offence, namely the presumption of belief in age under s. 172.1(3), and the mandatory minimum sentence of one year when the offence is prosecuted by indictment under s. 172.1(2)(a) of the *Criminal Code.* The Attorney General for Ontario appeals from the declaration of the Court of Appeal for Ontario that these provisions violate ss. 11(d) and 12 of the *Charter*, respectively.

2. The salient feature of s. 172.1 is that it criminalizes sexually predatory online communication not only with an actual child, but also with an interlocutor whom the accused believes to be a child. The offence was thus specifically designed to permit undercover police officers to pose online as children in order to catch sexual predators before they are able to harm an actual child. As this Honourable Court emphasized in *R. v. Legare*, s. 172.1 is a law enforcement tool serving "to close the cyberspace door before the predator gets in to prey."[1]

3. Section 172.1(3) creates a statutory presumption that a representation to the accused that his or her online interlocutor is underage is proof that the accused believed the interlocutor to be underage, in the absence of evidence to the contrary. This "rebuttable presumption facilitates the prosecution of child luring offences while leaving intact the burden on the Crown to prove guilt beyond a reasonable doubt."[2] Accordingly, this provision does not infringe the presumption of innocence in s. 11(d) of the *Charter*, or alternatively, any such minimal infringement is demonstrably justified under s. 1 of the *Charter*. This conclusion has overwhelming support in post-*Oakes* appellate jurisprudence considering similar legislative provisions in the context of ss. 11(d) and 1 of the *Charter*.

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[1] *R. v. Legare*, 2009 SCC 56, at para. 25.
[2] *R. v. Levigne*, 2010 SCC 25, at para. 30.

4. Further, the appellant's position is that the Court of Appeal erred in striking down the mandatory minimum sentence of one year when this offence is prosecuted by indictment. The Court of Appeal found that the minimum sentence constituted a grossly disproportionate punishment contrary to s. 12 of the *Charter* as it applied to offences of mere negligence. In holding that the offence of child luring can be committed unintentionally, the Court of Appeal fundamentally misconstrued the moral culpability inherent in this offence. This holding contradicts the specific language of the statutory provision which narrowly defines the moral culpability for this offence as communicating *for the purpose of facilitating a specific sexual offence with the belief that the person so targeted is under 16 years of age.* Once this subjective moral fault is properly defined in terms of a belief that the target of the communication is under 16, together with a specific intention to facilitate a sexual offence against that person, the minimum sentence of one year is not grossly disproportionate either in the present case or in reasonably foreseeable instances of this offence.

B. The Offence

5. On February 3, 2013, the respondent placed a personal ad on Craigslist, under the heading "Daddy looking for his little girl". Two days later Police Constable Hilary Hutchinson replied to the email address provided, posing as "Mia Andrews", a 14-year-old girl. The respondent quickly turned the email conversation to sex, immediately after Mia had told him twice that she was 14.[3]

6. The respondent's sexually explicit directions continued through February, March, and April. He repeatedly invited Mia to touch herself sexually, to send him explicit photos, and to watch pornography on her computer. The respondent was told on multiple occasions that Mia was 14 years old. Mia's messages also referenced parents, grandparents, and school activities, and were always sent before or after school hours on weekdays. At one point, the respondent suggested that Mia skip school without her mother finding out. He told Mia that he would pick her up near her school and then

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[3] Appellant's Record ("AR"), Vol. III, Tab 11, Email Communications, pp. 15-16.

graphically described the sexual acts that they would perform together. Ultimately, the meeting did not occur. For sentencing purposes, however, the trial judge found that "Morrison had an intention to meet and that intention would have been realized if Mia had expressed a greater degree of receptiveness to the idea."[4]

7. PC Hutchinson arrested the respondent for child luring on the morning of May 23, 2013. Upon arrest, he made the spontaneous statement that "I was only talking to one girl." The respondent gave a further statement at the police station to the effect that he did not know whether or not she was a child. He added that on the internet "you don't really know" whether you are speaking to a child or to an adult.[5]

8. The respondent testified at trial that he thought that he was speaking with an adult woman who was pretending to be a child. He could not explain why this was not what he told the police upon arrest. His only explanation was that he was in shock. On the other hand, the respondent agreed that he knew that there was a possibility that a 14-year-old child was going to respond to his ad, that he did nothing to prevent that from happening, and that he did nothing to verify Mia's age before asking her to touch herself sexually.[6]

C. The Rulings at Trial

1. The Ruling on the Constitutionality of Ss. 172.1(3) and (4) of the *Criminal Code*

9. At trial the respondent challenged the constitutionality of both ss. 172.1(3) and (4) of the *Criminal Code.* Gage J. held that the presumption regarding age in s. 172.1(3) of the *Code* breached the right to be presumed innocent in s. 11(d) of the *Charter* by compelling a conviction despite the presence of a reasonable doubt.[7] Subsection (3) provides that a representation that the computer interlocutor is underage is, in the absence

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[4] AR, Vol. III, Tab 11, Email Communications, pp. 18-46; Vol. I, Tab 3, Reasons for S. 12 *Charter* Ruling and Sentence, at para. 62.
[5] AR, Vol. I, Tab 2, Reasons for Judgment on Conviction, para. 21; AR, Vol. III, Tab 12, Police Statement Transcript, May 23, 2013, pp. 63, 74.
[6] AR, Vol. II, Tab 9, Trial Proceedings, December 15, 2014, Evidence of Douglas Morrison, p. 169, l.2-9, p. 191, l.3-30, p. 208, l.1-28, p. 230, l.27-30, p. 245, l. 4 – p. 246, l.19.
[7] AR, Vol. I, Tab 1, Reasons for *Charter* Ruling on Ss. 172.1(3) and (4).

of evidence to the contrary, proof that the accused believed the interlocutor to be underage. The trial judge held that since "much is not as it seems" on the internet, it did not necessarily follow that an online representation as to age would be believed by the person to whom it was made.

10. As for s. 172.1(4), Gage J. concluded that the reasonable steps requirement it imposed did not violate s. 7 of the *Charter*. When the accused relies on the defence that he or she believed the interlocutor to be of legal age, this provision requires the Crown to establish beyond a reasonable doubt that the accused failed to take reasonable steps or exercise due diligence in ensuring that his communications were with a person of legal age. The effect of this provision is that sexual communications that otherwise meet the definition of the offence will not be excused by a bald and unsupported assertion that the accused believed he was communicating with an adult.

11. With regard s. 1 of the *Charter,* Gage J. took the view that subsection (3) would not survive a proportionality analysis under s. 1, inasmuch as subsection (4) is "sufficient to eliminate specious claims of innocent belief or ignorance." Further, even in the absence of the presumption under subsection (3), a common sense inference would apply to the analysis of honest belief when there is a representation as to age in the course of the communication at issue.

2. The Reasons on Conviction

12. Given the undisputed sexual content and purpose of the respondent's communication with Mia, the central issue at trial was his belief that he was communicating with a person under 16 years of age. The trial judge approached this issue in two stages.[8] The first question was whether the Crown proved beyond a reasonable doubt that the appellant believed he was communicating with someone under 16. Gage J. found that it was "difficult to credit" the respondent's assertion that he did not believe that he was communicating with a child, in light of several factual findings, e.g., that the online dialogue did not support the contention that the respondent was

[8]AR, Vol. I, Tab 2, Reasons for Judgment on Conviction.

engaged with another adult in the exploration of a role-play fantasy, and that the respondent's police statement made no mention of role playing with an adult because it did not reflect his true state of mind.

13. Despite these findings, Gage J. still had a reasonable doubt as to the respondent's culpable belief about the age of his interlocutor. Gage J. was only satisfied beyond a reasonable doubt that he "was at least indifferent" to the age of his interlocutor, where being indifferent meant "simply not turning his mind to the question in any meaningful way." However, Gage J. found that this state of indifference was not the equivalent of belief, and that therefore, the respondent's evidence was "sufficient, if barely so, to inspire a reasonable doubt concerning his subjective belief" regarding Mia's age.

14. In light of this conclusion, Gage J. turned to the second stage of the analysis, formulated as an inquiry into reasonable steps taken to ascertain the age of the interlocutor. Gage J. considered in turn several potential steps taken by the respondent, but concluded that none of them constituted reasonable steps to ensure that his interlocutor was an adult. In the end result, the trial judge was satisfied beyond a reasonable doubt that the respondent "did not exercise the degree of care in ascertaining [Mia's] age …that a reasonable person in the circumstances would have exercised."

3. The Ruling on the Mandatory Minimum Sentence

15. Describing the respondent's state of mind as mere indifference, as opposed to an affirmative belief, about the age of his interlocutor played a crucial role in concluding that the one-year mandatory minimum sentence for this offence was unconstitutional. Gage J. found that the offence captures a wide spectrum of varying moral culpability, including at the low end, "unreasonable indifference or negligence" with regard to the age of the interlocutor or the target of luring. As a result, Gage J. concluded that s. 172.1(1)(b) casts its net over a wide spectrum of moral culpability with the effect that a

one-year mandatory minimum sentence becomes grossly disproportionate for offenders at the low end of that spectrum.[9]

16. Significantly, the trial judge considered that the respondent's crime was one of unreasonable indifference or negligence, and that the Crown had not proven that the respondent entered into the internet communication with a subjective intent to prey on children. In the particular circumstances of this case, Gage J. found that a sentence of four months would be appropriate, which rendered the one-year mandatory minimum sentence grossly disproportionate.

D. The Decision of the Court of Appeal for Ontario

1. The Presumption of Belief in Age under S. 172.1(3) of the *Criminal Code*

17. Writing for the Court (Watt and van Rensburg JJ.A. concurring), Pardu J.A. agreed with the trial judge's conclusion that the presumption of belief in s. 172.1(3) infringes s. 11(d) of the *Charter* inasmuch as it permits conviction despite the presence of a reasonable doubt as to whether the accused believed that the online interlocutor was underage. In adopting the trial judge's reasons on this heading, Pardu J.A. took the view that, even if there is no evidence to the contrary, namely that the accused did not believe his interlocutor was underage, it does not follow inexorably from proof that the interlocutor represented that he or she was underage that the accused believed the representation. Citing the pervasiveness of misrepresentations on the internet, Pardu J.A. reasoned that "an online representation as to age may occur in such circumstances as to fail to establish an accused's belief that the interlocutor was underage beyond a reasonable doubt, even in the absence of evidence to the contrary."[10]

18. Turning to s. 1 of the *Charter*, Pardu J.A. concluded that the Crown failed to show that the breach of s. 11(d) was justified in this case. In light of clear language from the jurisprudence on s. 172.1, Pardu J.A. accepted that the presumption facilitates the

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[9] AR, Vol. I, Tab 3, Reasons for S. 12 *Charter* Ruling and Sentence.
[10] AR, Vol. I, Tab 4, Judgment of the Court of Appeal for Ontario ("OCA decision"), at paras. 57-61.

prosecution of child luring by computer, and that it is thus rationally connected to a pressing and substantial state objective, namely protecting children from sexual predation over the internet. However, the presumption failed the minimal impairment and the overall proportionality tests.

19. Echoing the trial judge's observation that the common sense inference of belief from representation would suffice, Pardu J.A. took the view that the absence of the presumption would not undermine the prosecution of this offence. In conclusion, Pardu J.A. was "not persuaded that the presumption actually facilitates the conviction of child luring offences by increasing the number of convictions that would ordinarily occur without resort to the presumption or that there is a problem with unjustified acquittals."[11]

2. The Reasonable Steps Requirement under S. 172.1(4) of the *Criminal Code*

20. The Court of Appeal also upheld the trial judgment in affirming the constitutional validity of the reasonable steps requirement under s. 172.1(4) as complying with the principles of fundamental justice under s. 7 of the *Charter*. While s. 172.1 requires subjective *mens rea* in that the accused has to communicate with the purpose of facilitating a sexual offence against a child, the reasonable steps requirement introduces an objective dimension to the determination of the accused's belief as to the age of the interlocutor. However, this does not contravene s. 7 of the *Charter* because child luring is not one of those extremely serious and heinous offences, such as murder, which require a purely subjective standard of fault.[12]

3. The Mandatory Minimum Sentence

21. Under the first step of the s. 12 analysis, in considering the fit sentence for the respondent, the Court of Appeal endorsed the trial judge's conclusion that the respondent had a diminished level of moral blameworthiness for this offence.

> The Crown failed to prove that the accused believed he was communicating with an underage person. It did prove he failed to take reasonable steps to ascertain the

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[11] *Ibid.* at para. 73.
[12] *Ibid.* at paras. 94, 110.

> age of the other person. This degree of fault, negligence, taking into account what was known to Morrison, is significantly less blameworthy than the conduct of someone who, for example, deliberately sets about to lure a child. It is axiomatic that a person who commits an offence by negligence is less morally blameworthy than someone who intentionally commits a criminal offence. In *Creighton*, McLachlin J. noted that "those causing harm intentionally must be punished more severely than those causing harm unintentionally". [13][Emphasis added]

22. This conclusion was the linchpin for the ultimate determination that the one-year mandatory minimum sentence results in the imposition of a grossly disproportionate sentence in the circumstances of this case, contrary to s. 12 of the *Charter*.

> In my view, the disparity between the one-year mandatory minimum and what would otherwise be a fit and appropriate sentence for Morrison is sufficient to meet the high bar of gross disproportionality under s. 12. Morrison's blameworthiness is diminished in that it cannot be said that he believed his interlocutor was underage when engaging in sexualized conversations. … Although his communications persisted for some two months, it cannot be said that he knowingly embarked on a systematic process of grooming a young person for sexual activity or to facilitate commission of a sexual assault that would merit a substantial sentence of imprisonment well above the fourth months he received. …
>
> On the other hand, an offender who knowingly embarks on a systematic process of grooming a young person for sexual activity or to facilitate commission of a sexual assault would merit a substantial sentence of imprisonment, in some cases, well above the mandatory minimum.[14][Emphasis added]

PART II: POINTS IN ISSUE

23. The following constitutional questions are at issue on this appeal:

1. Does s. 172.1(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 infringe s. 11(d) of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

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[13] *Ibid.* at para. 121.
[14] *Ibid.* at paras. 131-32.

3. Does the mandatory minimum sentence of one year under s. 172.1(2)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46 infringe s. 12 of the *Canadian Charter of Rights and Freedoms*?

24. It is the position of the appellant, the Attorney General for Ontario, that ss. 172.1(3) and 172.1(2)(a) of the *Criminal Code* are constitutional.

PART III: BRIEF OF ARGUMENT

A. Section 172.1(3) of the *Criminal Code* Does Not Infringe the Right to Be Presumed Innocent under S. 11(d) of the *Charter*

1. The Nature of the Offence of Child Luring under S. 172.1 of the *Code*

25. For ease of reference, s. 172.1 of the *Criminal Code* provides in relevant part as follows:

> 172.1(1) Every person commits an offence who, by a means of telecommunication, communicates with
>
> (b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 [sexual interference] or 152 [invitation to sexual touching], subsection 160(3) [bestiality] or 173(2) [exposure of genitals] or section 271, 272, 273 [sexual assault, sexual assault causing bodily harm, aggravated sexual assault] or 280 [abduction] with respect to that person.
>
> (3) Evidence that the person referred to in paragraph (1) (a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.
>
> (4) It is not a defence to a charge under paragraph (1) (a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

26. Writing for this Honourable Court in *R. v. Legare*, Justice Fish adopted the observation of Doherty J.A. in *R. v. Alicandro* that the purpose of s. 172.1 is evident from its language, explicated as follows:

> The language of s. 172.1 leaves no doubt that it was enacted to protect children against the very specific danger posed by certain kinds of communications via computer systems. The Internet is a medium in which adults can engage in anonymous, low visibility and repeated contact with potentially vulnerable children. The Internet can be a fertile breeding ground for the grooming and preparation associated with the sexual exploitation of children by adults. One author has described the danger in these terms:
>
> > For those inclined to use computers as a tool for the achievement of criminal ends, the Internet provides a vast, rapid and inexpensive way to commit, attempt to commit, counsel or facilitate the commission of unlawful acts. The Internet's one-[to]-many broadcast capability allows offenders to cast their nets widely. It also allows these nets to be cast anonymously or through misrepresentation as to the communicator's true identity. Too often, these nets ensnare, as they're designed to, the most vulnerable members of our community -- children and youth. ...
> >
> > Cyberspace also provides abuse-intent adults with unprecedented opportunities for interacting with children that would almost certainly be blocked in the physical world. The rapid development and convergence of new technologies will only serve to compound the problem. Children are the frontrunners in the use of new technologies and in the exploration of social life within virtual settings.[15]

27. To achieve this remedial purpose, an offence under s. 172.1(1)(b) comprises three elements: (1) an intentional telecommunication; (2) with a person whom the accused knows or believes to be underage (namely, under 16 years of age); and (3) for the specific purpose of facilitating the commission of a specified secondary offence – abduction or a sexual offence – with respect to the underage person. In this context, “facilitating” includes “helping to bring about” and “making it easier or more probable”, whether by

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[15] *R. v. Legare supra*, at para. 26, citing *R. v. Alicandro*, 2009 ONCA 133, at para. 36, in turn citing Gregory J. Fitch, Q.C., "Child Luring" (Paper presented to the National Criminal Law Program: Substantive Criminal Law, Advocacy and the Administration of Justice, Edmonton, Alberta, July 2007), Federation of Law Societies of Canada, 2007, [vol. 1], section 10.1, at pp. 1 and 3.

using sexually explicit language or by grooming young persons to reduce their inhibitions. The particular language used is not an element of the offence. Rather, the focus is on the intention of the accused at the time of the telecommunication.[16]

28. In interpreting this provision, this Court cautioned against categorizing these three essential elements as forming part of the *actus reus* or *mens rea* of the offence. While it is clear that the intention of the accused must be determined subjectively, and that the Crown must establish all three elements beyond a reasonable doubt, it is neither necessary nor helpful to distinguish between the prohibited act component and the requisite mental element of this offence. In particular, "forcibly compartmentalizing the underage requirement … - [a person who is, or who the accused believes is, underage] - as either part of the *actus reus* or part of the *mens rea*, may well introduce an element of confusion in respect of both concepts."[17]

29. In *R. v. Levigne*, this Court shed further light on the operation of s. 172.1, in particular as to how the procedural provisions in ss. 172.1(3) and (4) work in the context of proving the elements of the offence. Section 172.1(3) creates a statutory presumption that a representation to the accused that his or her online interlocutor is underage is proof that the accused believed the person to be underage, in the absence of evidence to the contrary. This Court noted that "[t]his rebuttable presumption facilitates the prosecution of child luring offences while leaving intact the burden on the Crown to prove guilt beyond a reasonable doubt."[18]

30. Under s. 172.1(4), it is not a defence that the accused believed his or her online interlocutor to be an adult "unless the accused took reasonable steps to ascertain the age of the person." This Court clarified that "[t]his provision was enacted by Parliament to foreclose exculpatory claims of ignorance or mistake that are entirely devoid of an objective evidentiary basis."[19]

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[16] *Ibid.* at paras. 28, 36.
[17] *Ibid.* at para. 39.
[18] *R. v. Levigne supra*, at para. 30.
[19] *Ibid.* at para. 31.

31. Finally, in *Levigne*, Justice Fish offered guidance on the overall operation of s. 172.1 as follows:

> Read together and harmoniously with the overarching purpose of s. 172.1, the combined effect of subss. (3) and (4) should be understood and applied this way:
>
> 1. Where it has been represented to the accused that the person with whom he or she is communicating by computer (the "interlocutor") is underage, the accused is presumed to have believed that the interlocutor was in fact underage;
>
> 2. This presumption is rebuttable: It will be displaced by evidence to the contrary, which must include evidence that the accused took steps to ascertain the real age of the interlocutor. Objectively considered, the steps taken must be reasonable in the circumstances.
>
> 3. The prosecution will fail where the accused took reasonable steps to ascertain the age of his or her interlocutor and believed that the interlocutor was not underage. In this regard, the evidential burden is on the accused but the persuasive burden is on the Crown.
>
> 4. Such evidence will at once constitute "evidence to the contrary" under s. 172.1(3) and satisfy the "reasonable steps" requirement of s. 172.1(4).
>
> 5. Where the evidential burden of the accused has been discharged, he or she must be acquitted if the trier of fact is left with a reasonable doubt whether the accused in fact believed that his or her interlocutor was not underage.[20]

2. The Presumption in S. 172.1(3) Does Not Infringe S. 11(d) of the *Charter*

32. In holding that the rebuttable presumption in s. 172.1(3) violates s. 11(d) of the *Charter*, the Court of Appeal erred by failing to take into account the purpose and context of the statutory provision where the presumption operates. Properly interpreted, subsection (3) does not infringe the presumption of innocence as it applies only where there is a representation that the interlocutor is underage in the context of a

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[20] *Ibid.* at para. 32.

communication for the purpose of facilitating a sexual offence, and where there is no other evidence on the issue. In those circumstances, there can be no reasonable doubt about the accused's belief, i.e., the only reasonable inference is that the accused believed his or her interlocutor to be underage.

33. The test for a potential infringement of s. 11(d) of the *Charter* is well-established. A statutory provision infringes s. 11(d) where it allows for an accused person to be found guilty despite the presence of a reasonable doubt as to guilt. Statutory presumptions are subject to scrutiny against this standard inasmuch as they require the trier of fact to draw a particular factual inference upon proof beyond a reasonable doubt of a basic fact. An essential element of the offence can thus be established through proof of a substituted fact. Such a presumption is constitutionally valid if upon proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the essential element.

> [A] presumption that imposes an evidential burden on the accused – that is, a presumption requiring the trier of fact to draw a conclusion from proof of a basic fact if no evidence raising a reasonable doubt is adduced by either the Crown or the accused – does not violate the presumption of innocence if the unknown fact follows inexorably from the basic fact. In such circumstances, there is no possibility that drawing this inference will result in the accused being convicted despite the existence of a reasonable doubt.[21]

34. Citing the pervasiveness of misrepresentations on the internet, the Court of Appeal took the view that it does not follow inexorably from proof that the interlocutor represented that he or she was underage that the accused believed the representation. However, the question is not generally whether someone can be presumed to believe what he or she is told online. It is hard to argue with the trite observation that representations on the internet are unreliable. While that general observation might be true about the online world, it fails to take into account the specific purpose and context of the offence at issue: the sexual exploitation of children in the anonymous realm of the internet.

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[21] *R. v. Audet*, [1996] 2 S.C.R. 171, at para. 44; *R. v. Downey*, [1992] 2 S.C.R. 10, at p. 29.

35. The essence of the child luring provision under s. 172.1 is that it criminalizes sexually predatory internet communication not only with an actual child, but also with an interlocutor whom the accused *believes* to be a child. In this sense, s. 172.1 creates an inchoate offence in which liability turns on what the accused believed the materials facts to be, and not on what those facts actually were.[22] This offence was specifically designed to permit undercover police officers to pose online as children in order to catch sexual predators before they are able to harm an actual child. As this Honourable Court emphasized, s. 172.1 is a law enforcement tool serving "to close the cyberspace door before the predator gets in to prey."[23]

36. The presumption regarding belief in age reflects the fact that the prohibited conduct in the form of telecommunication takes place entirely in cyberspace, and not in person. While s. 172.1 can apply to online discourse with a known victim, the typical offender trolls the internet to ensnare children in general. This accused will only form a belief, as opposed to actual knowledge, about his interlocutor's age, and it will be based necessarily on representations, as opposed to being verifiable through direct experience.

37. The Court of Appeal erred in its analysis of this provision by failing to appreciate that, given the context of cyberspace, the focus is not on knowledge or true belief. In essence, the Court of Appeal reasoned that the accused cannot be presumed to believe an online representation because it is not verifiable. It is not as if the accused can look behind the computer screen to ascertain who is actually there. But that does not mean that the accused does not form any belief whatsoever to ground criminal liability. A belief in this context will be necessarily imperfect, based on mere representations, but the accused will form a belief about the age of the interlocutor and will continue to communicate on the strength of that belief.

38. It is against this background that one must consider the other two significant contextual factors that anchor the operation of the presumption in s. 172.1(3). First, the

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[22] *R. v. Alicandro supra*, at paras. 26, 32-33.
[23] *R. v. Legare supra*, at paras. 25-26; *R. v. Levigne supra*, at paras. 24-28.

presumption applies only in the context of communications for the purpose of facilitating the commission of an underlying sexual offence. Second, the presumption applies only where there is no evidence to the contrary.

39. When considered in its proper context, the presumption passes constitutional muster, as Durno J. held in *R. v. Ghotra,* a decision from the Ontario Superior Court of Justice, which the Court of Appeal failed to address or to reconcile with the trial ruling in the instant case.

> [The presumption] only operates in cases where at the end of the evidence there is *no evidence* that tends to show the accused believed the other person was older than the specified age. What the trier of fact is left with is a representation made to the accused in the context of a communication for the purpose of facilitating the commissions of an underlying offence and there is no other evidence on the issue, no direct or indirect representations that the other person was an adult, no direct or circumstantial evidence of the accused's belief, and no evidence of 'reasonable steps' he or she took, in those circumstances, I am satisfied that it would be unreasonable for the trier of fact to conclude she or he had a reasonable doubt whether the accused believed the other person was underage. What Parliament was directing judges to do was to draw the only inference that is available to be drawn on the record. There would be an inexorable connection in those circumstances.[24]

40. As a further indication that s. 172.1(3) does not infringe the presumption of innocence, it is worth noting that the presumption of belief in age in s. 172.1(3) is not a reverse onus provision. It does not compel evidence from the accused, require him or her to testify, or impose a persuasive burden of proof. The "evidence to the contrary" to which it refers must tend to show but need not prove that the accused believed the interlocutor to be an adult. Such evidence can come from any source, including the Crown's case, and it often comes from the internet communication itself. As this Court emphasized in *Levigne,* "s. 172.1(3) assists the Crown in discharging its evidential

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[24] *R. v. Ghotra,* 2016 ONSC 1324, at para. 125; *see also R. v. Allen,* 2017 ONSC 405, at paras. 21-22, 46-47, 50-51, rendered before the Court of Appeal decision in this case, and adopting the reasoning in *Ghotra* to uphold the constitutionality of s. 172.1(3).

burden on the element of culpable belief, but preserves for accused persons the benefit of any reasonable doubt where the record discloses 'evidence to the contrary'".[25]

41. Finally, the appellant submits that, contrary to the view of the trial judge in this case, the reasonable steps requirement in s. 172.1(4) is a separate provision that cannot provide a basis for finding that subsection (3) is unconstitutional. While the two provisions in ss. 172.1(3) and (4) are meant to work harmoniously together to fulfill the overall purpose of this statutory provision, as explained by this Court in *Levigne,* they have different roles and their application is triggered by different circumstances, i.e., a representation as to age and an accused's assertion of innocent belief, respectively.

42. To be sure, by requiring objective evidence of reasonable steps, subsection (4) restricts the accused's ability to defend on the basis of a purely subjective belief, unsupported by the evidence. However, it does not compel any evidence from the accused or restrict the accused's ability to overcome the presumption by raising a reasonable doubt, which is the relevant inquiry in considering a potential s. 11(d) *Charter* infringement. Rather, it is clear that the persuasive burden of proof remains on the Crown throughout, thus ensuring that the accused is not convicted despite the presence of a reasonable doubt contrary to s. 11(d) of the *Charter*. As this Court explained in *Levigne*, where both subsections (3) and (4) apply, their combined operation ensures that the accused "must be acquitted if the trier of fact is left with a reasonable doubt whether the accused in fact believed that his or her interlocutor was not underage."[26]

B. In the Alternative, if S. 172.1(3) Infringes the Presumption of Innocence, the Infringement Is Justified under S. 1 of the *Charter*

43. The well-known test for determining whether a statutory provision that infringes a Charter right is nonetheless justified was established in *R. v. Oakes*. First, the provision must serve a pressing and substantial objective, sufficiently important to warrant overriding a protected right. Second, the provision must pass a three-part proportionality

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[25] *R. v. Levigne supra*, at paras. 17, 30.
[26] *Ibid.* at para. 32.

test which requires that it (a) be rationally connected to the objective; (b) minimally impair the right in question; and (c) have deleterious effects that are proportional to the salutary effects and the importance of the legislative objective.[27]

44. While social science and statistical evidence is often adduced in support of a s. 1 justification, the Court of Appeal acknowledged that such evidence is not always necessary. Indeed, the cautionary remarks from this Court, cited by the Court of Appeal, that constitutional cases should not be decided without an adequate evidentiary record referred to situations where there was no actual evidence of a *Charter* infringement. In other words, the concern about the absence of an evidentiary record has often been raised at the initial stage of establishing the infringement of a *Charter* right, rather than the subsequent stage of a s. 1 justification.[28]

45. When it comes to the latter, this Court has consistently held that the justification can be accomplished through logic, common sense and inferential reasoning.[29] There may be cases where certain elements of the s. 1 analysis are obvious or self-evident.[30] This is particularly the case for legislation meant to protect children from sexual abuse. As this Court recently echoed the observation of Laskin J.A. in *R. v. Budreo* (2000), 46 O.R. (3d) 481 (C.A.), "[c]hildren are among the most vulnerable groups in our society. The sexual abuse of young children is a serious societal problem, a statement that needs no elaboration." In doing so, this Court reiterated that "[p]roviding enhanced protection to children from becoming victims of sexual offences is vital in a free and democratic society."[31]

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[27] *R. v. Oakes,* [1986] 1 S.C.R. 103, at pp. 138-140; *R. v. Laba,* [1994] 3 S.C.R. 965, at p. 1006.
[28] *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, at para. 28.
[29] *Harper v. Canada (Attorney General),* 2004 SCC 33, at para. 78; *R. v. Butler*, [1992] 1 S.C.R. 452, at pp. 503-04; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 768, 776; *R. v. Sharpe,* 2001 SCC 2, at para. 85; *R. v. Bryan*, 2007 SCC 12, at paras. 32-34, 67-69, 101-103.
[30] *R. v. Oakes supra,* at p. 138; *Doré c. Bernard,* 2010 QCCA 24, at paras. 33-34.
[31] *R. v. K.R.J.*, 2016 SCC 31, at para. 66; *See also R. v. Sharpe supra,* at para. 82.

1. Pressing and Substantial Objective

46. As the Court of Appeal acknowledged, it is beyond dispute that s. 172.1 serves a pressing and substantial objective in that it "was adopted by Parliament to identify and apprehend predatory adults who, generally for illicit sexual purposes, troll the internet to attract and entice vulnerable children and adolescents." The internet offers a vast, borderless, and largely anonymous landscape allowing for the sexual exploitation of children due to its inherent potential for deception. Section 172.1 was enacted to protect children against the specific danger of sexual exploitation posed by internet communications. Parliament's objective was "to close the cyberspace door before the predator gets in to prey."[32]

47. Further, by making it an offence to communicate by computer for a prohibited sexual propose with a person who the accused *believes* is underage, s. 172.1 serves to prevent harm against children by allowing for sting operations whereby police investigators use the anonymity provided by the internet to catch lurking predators. This is essential in ensuring that the provision can be adequately enforced because "[c]hildren cannot be expected to police the Internet. The state is charged with the responsibility of protecting its children. That responsibility requires not only that the appropriate laws be passed, but that those laws be enforced."[33]

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[32] *R. v. Legare supra*, at paras. 25-26; *R. v. Levigne supra*, at paras. 24-28; *R. v. Alicandro supra*, at para. 36. The appellant notes that legislative provisions similar to s. 172.1(3) can be found in other jurisdictions, such as Australia, both federally in the *Criminal Code Act 1995*, s. 474.28(3) and (4), and in the States of Queensland, *Criminal Code 1899*, ss. 218A(8), 218B(7), Tasmania, *Criminal Code Act 1924*, s. 125D(7), and Western Australia, *Criminal Code Act Compilation Act 1913*, s. 204B(9).

[33] *R. v. Levigne supra*, at paras. 25-29; *R. v. Alicandro supra*, at para. 38. *See also:*
House of Commons Debate, No. 054 (03 May 2001) at 1620 (Hon. Anne McLellan) online: http://www.ourcommons.ca/DocumentViewer/en/37-1/house/sitting-54/hansard#LINK233;
Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs - Issue 22 - Evidence (12 December 2001) p. 49 of 54, online: https://sencanada.ca/en/Content/Sen/committee/371/lega/22ev-e.

2. Proportionality

a. Rational Connection

48. In this light, the Court of Appeal recognized that there is a rational connection between the presumption in s. 172.1(3) and the state objective of protecting children from sexual predation on the internet. It is often difficult for the Crown to establish the subjective belief of the accused, particularly in the context of internet communications. The presumption in subsection (3) addresses this inherent limitation and thereby enhances the effectiveness of s. 172.1.

> This rebuttable presumption facilitates the prosecution of child luring offences while leaving intact the burden on the Crown to prove guilt beyond a reasonable doubt. Put differently, s. 172.1(3) assists the Crown in discharging its evidential burden on the element of culpable belief, but preserves for accused persons the benefit of any reasonable doubt where the record discloses "evidence to the contrary".[34]

b. Minimal Impairment

49. Despite clear direction from this Honourable Court as to the importance of the state objective in combatting child internet luring, and the role of the presumption in s. 172.1(3) in enforcing the provision, the Court of Appeal erred in finding nonetheless that s. 172.1(3) was not justified under s. 1 because it failed to meet the minimal impairment and overall proportionality branches of the *Oakes* test.

50. In coming to this conclusion, the Court of Appeal required proof that the presumption actually increases the number of convictions for child luring offences or that there is a problem with unjustified acquittals.[35] However, such proof is virtually impossible to adduce. No record could be produced of comparing the outcome of prosecutions with and without the presumption in s. 172.1(3). Further, it would not be appropriate for the Crown to argue on appeal that acquittals are unjustified, let alone to use this argument to justify a constitutional infringement. Compiling a record of

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[34] *R. v. Levigne supra*, at para. 30.
[35] AR, Vol. I, Tab 4, OCA Decision, at para. 73.

allegedly unjustified acquittals would likely be seen as an overreach by the prosecution in order to challenge in a roundabout way the presence of a reasonable doubt.

51. While requiring impossible proof of the effectiveness of the presumption in s. 172.1(3), the Court of Appeal ultimately took the view that it was unnecessary because the common sense permissive inference of belief based on the record of the representation as to age would be sufficient.[36] This holding shows that the Court of Appeal erred in its conclusion on the minimal impairment branch in two ways. First, if the effect of the common sense inference is so similar to the presumption, it will be impossible to prove that the latter is more effective, as required by the Court of Appeal. Second, if the presumption does little more to advance the prosecution than the common sense inference, it should follow that it minimally infringes on the presumption of innocence.

52. By failing to uphold the presumption as minimally infringing on the s. 11(d) *Charter* right, the Court of Appeal departed from binding jurisprudence on minimal impairment in the context of a s. 1 justification of a s. 11(d) breach. It is well-established that, to satisfy this branch of the analysis, Parliament is not required to choose the absolutely least intrusive alternative. In a close case, due deference should be given to Parliament's selection of the appropriate evidentiary device to further the legislative objective.[37]

53. Moreover, dealing specifically with the choice between the common sense permissive inference and a legislated rebuttable presumption placing an evidential burden on the accused, Parliament is entitled to deference in choosing the latter. In this sense, the legislature can minimally infringe on the presumption of innocence to emphasize that an acquittal should be based on evidence rather than speculation, which is precisely the function of the presumption of belief in the absence of evidence to the contrary.[38]

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[36] *Ibid.* at para. 72.
[37] *R. v. Downey supra*, at p. 37.
[38] *R. v. Nagy* (1988), 45 C.C.C. (3d) 350 (Ont. C.A.), at p. 365.

54. In striking down s. 172.1(3), the Court of Appeal failed to address any of the jurisprudence on s. 11(d) and s. 1 of the *Charter*. Had the Court adverted to the authorities, it would have had to acknowledge that similar legislative provisions have been upheld in the vast majority of cases post-*Oakes*. Such provisions are generally seen to minimally impair the presumption of innocence by only placing an evidential burden on the accused to raise a reasonable doubt, as opposed to a reverse onus to establish a defence on a balance of probabilities. Indeed, in a few notable cases, this Court has even upheld the latter type of statutory provisions in the context of particularly pernicious social harms associated with hate propaganda or drinking and driving.[39]

55. The only significant decision to strike down a provision that imposes a mere evidential burden on the accused to raise a reasonable doubt is *R. v. St-Onge Lamoureux*, which did so in the specific context of the new drinking and driving amendments dealing with the *Carter* defence. Even there, this Honourable Court only struck down part of the amendments that infringed on s. 11(d), essentially to the extent that they went too far, i.e., the burden on the accused to raise a reasonable doubt that the breathalyzer was functioning and operated properly was upheld, but a further requirement that the accused raise a doubt that his or her blood alcohol level in fact exceeded .08 was struck down.[40]

56. With the exception of the *St-Onge Lamoureux* decision in this particular context, virtually all other appellate decisions since *Oakes* have upheld similar legislative provisions containing a presumption that applies "absent evidence to the contrary", which only requires an accused to raise a reasonable doubt.[41] The Court of Appeal made no reference to this prior jurisprudence, or any attempt to distinguish and justify the different result in the present case. The appellant respectfully submits that there is no basis to

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[39] *R. v. Keegstra supra*; *R. v. Whyte*, [1988] 2 S.C.R. 3.

[40] *R. v. St-Onge Lamoureux*, 2012 SCC 57, at paras. 37-49, 59, 64-67; *See also R. c. Janoff* (1991), 68 C.C.C. (3d) 454 (Que. C.A.), striking down a statutory presumption which, despite operating "in the absence of evidence to the contrary", imposed a much heavier burden on the accused, effectively requiring him or her to produce evidence to set aside a prior court judgment. The presumption in *Janoff* was thus categorically different than the one at issue in the instant case.

[41] *R. v. Downey supra*; *R. v. Laba supra*; *R. v. Nagy supra*; *R. v. Gosselin* (1988), 45 C.C.C. (3d) 568 (Ont. C.A.); *R. v. Curtis* (1998), 123 C.C.C. (3d) 178 (Ont. C.A.); *R. v. Slavens* (1991), 64 C.C.C. (3d) 29 (B.C.C.A.); *R. v. Singh*, 2005 BCCA 591.

reach a different conclusion in this case, in that the jurisprudence clearly indicates that the present statutory presumption only minimally infringes the presumption of innocence.

c. Overall Proportionality

57. Finally, with regard to overall proportionality of effects, the Court of Appeal provided no analysis in support of a conclusory statement that the salutary effects of the limitation on s. 11(d) of the *Charter* do not outweigh the deleterious ones.[42] However, the deleterious effect of the statutory presumption can only be described as marginal. To rebut the presumption, the accused need only point to evidence capable of raising a reasonable doubt, which should allay any concern that this subsection will result in innocent persons being inculpated. Evidence tending to show that the accused did not believe the representation as to age can be easily led. It will either come from the communication itself, which is adduced by the Crown, or it will be uniquely in the possession of the accused.

58. In the discussion of minimal impairment, the Court of Appeal emphasized that, whenever the record discloses any evidence suggesting that the accused did not believe that his or her interlocutor was underage, the Crown cannot rely on the presumption of belief.[43] The import of this observation is that it does not take very much to render the presumption inoperable, which in turn suggests that the Court of Appeal did not perceive the deleterious effects of the statutory presumption to be particularly problematic. Rather, the Court of Appeal seemed to take the view that the presumption was not so much harmful as unnecessary in limiting s. 11(d) of the *Charter*. In other words, the concern was not so much with the magnitude of the deleterious effects, but rather with the absence of a clear benefit in resorting to the statutory presumption.

59. The appellant's position is that the presumption in s. 172.1(3) plays a significant beneficial role in ensuring that the overall provision applies in a harmonious and consistent manner. By clarifying that a reasonable doubt should be based on evidence,

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[42] AR, Vol. I, Tab 4, OCA decision, at para. 74.
[43] *Ibid.* at para. 73.

rather than speculation, the presumption is a useful procedural guideline to the determination of culpable belief. In this sense, it provides the touchstone for the relevant mental element for the offence of child luring, whether it is the relevant belief to attract liability or to raise a reasonable doubt as a defence. The presumption makes clear that belief as to the age of the interlocutor, whether proven as the culpable mental element or raised as a defence, has to be evidence-based by having an objective foothold in the communication and its surrounding context.

60. A proper focus on evidence-based beliefs renders it unhelpful and unnecessary to consider the accused's purely subjective belief, i.e., the accused's bare assertion without any objective basis that deep down he or she subjectively believed the interlocutor was not underage. This bare assertion can never be disproven beyond a reasonable doubt, which is why it cannot constitute a defence. By contrast, eliminating the presumption in s. 172.1(3) creates confusion about the mental element of the offence of child luring, as demonstrated by the trial judge's reasons on conviction in this case.

61. Without the benefit of the presumption regarding belief in age, the trial judge conducted an extensive review of the evidence which completely contradicted the accused's assertion that he believed that he was communicating with an adult. Nonetheless, despite the absence of any objective basis in the evidence for the accused's professed belief, the trial judge concluded that this bare assertion was capable of raising a reasonable doubt. Moving on to consider the reasonable steps requirement, the trial judge reviewed the same evidence to conclude unsurprisingly that the accused's purported belief that he was talking to an adult was not supported by any reasonable steps to ascertain the age of his interlocutor.[44] Not only is this analysis duplicative, but it also leads to confusion about the requisite culpable mental state for this offence. As it will be explored in the course of the s. 12 argument below, this approach misleadingly suggests that the accused's bare assertion that he or she did not believe the interlocutor to be a child is sufficient to lower the accused's culpability for this offence.

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[44] AR, Vol. I, Tab 2, Reasons for Judgment on Conviction.

62. The presumption in subsection (3) exposes the false distinction between the bare assertion of belief, as opposed to evidence-based belief in adult age, by clarifying that the former is irrelevant in deciding the accused's culpability for this offence. As this Court explained in *Levigne*, the harmonious overall operation of s. 172.1 avoids the confusing two-stage analysis conducted by the trial judge in this case. The presumption of belief in age in subsection (3) ensures that a reasonable doubt arises from "evidence to the contrary which must include evidence that the accused took steps to ascertain the real age of the interlocutor."

63. Accordingly, the presumption of belief in age has a significant salutary effect in facilitating the conceptually coherent and practically consistent application of the child luring offence. This salutary effect far outweighs the nominal limitation it imposes on the presumption of innocence. Overall, the appellant's position is that the jurisprudence from this Court and appellate courts throughout the country overwhelmingly establishes that, if it exists in this case, the minimal infringement on s. 11(d) is demonstrably justified under s. 1 of the *Charter*.

C. The One-Year Mandatory Minimum Sentence in S. 172.1(2)(a) of the *Criminal Code* Does Not Infringe S. 12 of the *Charter*

1. The Analytical Framework for a S. 12 *Charter* Challenge

64. In *R. v. Nur* and *R. v. Lloyd*, this Court recently clarified the analysis for determining whether a mandatory minimum sentence constitutes "cruel and unusual punishment" contrary to s. 12 of the *Charter*. The analysis involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence in question, having regard to the applicable objectives and principles of sentencing. The court should consider "the rough scale of the appropriate sentence" without necessarily fixing the sentence or sentencing range at a specific point. Second, "the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the offence and its circumstances."[45]

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[45] *R. v. Nur*, 2015 SCC 15, at para. 46; *R. v. Lloyd*, 2016 SCC 13, at paras. 22-23.

65. An infringement of s. 12 can be established in the circumstances of the case before the court or other reasonably foreseeable applications of the provision at issue. The latter inquiry requires the court to determine the range of the law in terms of the type of situations that may reasonably be expected to be caught by the mandatory minimum. This exercise should be guided by common sense and experience, and exclude from consideration far-fetched or remotely imaginable scenarios.

> The inquiry into cases that the mandatory minimum provision may reasonably be expected to capture must be grounded in judicial experience and common sense. The judge may wish to start with cases that have actually arisen… and make reasonable inferences from those cases to deduce what other cases are reasonably foreseeable. Fanciful or remote situations must be excluded… To repeat, the exercise must be grounded in experience and common sense. Laws should not be set aside on the basis of mere speculation.[46]

66. Finally, it is well-established that a finding of gross disproportionality requires crossing a high threshold. To be grossly disproportionate a sentence must be more than merely excessive or disproportionate vis-à-vis what the court considers an appropriate punishment for the offence in question. It must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society. In other words, this Court emphasized that the standard for constitutional scrutiny of a sentencing provision is that of "gross" disproportionality, rather than proportionality in sentencing, which is not a principle of fundamental justice. The high threshold mandated by the word "grossly" reflected the "Court's concern not to hold Parliament to a standard so exacting … as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender."[47]

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[46] *R. v. Nur supra*, at paras. 62, 74-77.

[47] *Ibid.* at para. 39; *R. v. Lloyd supra*, at paras. 24, 40-47.

2. The One-Year Mandatory Minimum Sentence Is Not Grossly Disproportionate in the Circumstances of the Present Case

67. At the time of the offence in this case, committed between February and April 2013, the punishment part of s. 172.1 read as follows:

> (2) Every person who commits an offence under subsection (1)
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or
>
> (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

68. When originally enacted in 2002, child luring was a hybrid offence punishable by a maximum of five years when prosecuted by indictment. Two subsequent amendments increased the maximum ceiling and imposed mandatory minimum terms. On June 22, 2007, the maximum punishment was increased to ten years as an indictable offence and 18 months on summary conviction. The mandatory minimum sentence at issue in this case was introduced on August 9, 2012, when s. 172.1(2) was amended to include a minimum punishment of one year when prosecuted by indictment, and a minimum term of 90 days on summary conviction.[48]

a. The Moral Culpability Inherent in the Offence of Child Luring

69. The fault component of the offence of child luring is the purpose to facilitate the commission of a sexual offence against an underage person. The accused's intention must be determined subjectively, in the sense that the Crown must prove that the accused communicated with the specific intent mandated by the plain language of the provision. The accused must be shown to have "engaged in the prohibited communication with the

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[48] The legislation was subsequently amended again on July 17, 2015, to increase the maximum punishment by indictment to 14 years, as well as both the maximum and the minimum terms on summary conviction to two years less a day and six months, respectively. The mandatory minimum of one year as an indictable offence, presently at issue, remains unchanged.

specific intent of facilitating the commission of one of the designated offences" against the intended recipient of the communication whom the accused believed to be underage. This is a high standard of subjective fault which ensures that the provision does not capture morally innocent communications.[49]

70. In this light, the Court of Appeal erred in concluding that the provision captured offenders whose degree of fault was at the level of mere negligence. The Court of Appeal reasoned that the respondent's moral blameworthiness was diminished because the Crown had failed to prove that he believed that he was communicating with an underage person, and had only shown that he had not taken reasonable steps to ascertain the age of his interlocutor. The Court concluded that "[t]his degree of fault, negligence, … is significantly less blameworthy than the conduct of someone who, for example, deliberately sets about to lure a child." To illustrate the distinction between committing an offence by negligence, as opposed to intentionally, the Court relied on this Court's decision in *R. v. Creighton,* where McLachlin J. (as she then was), noted that "those causing harm intentionally must be punished more severely than those causing harm unintentionally".[50]

71. This conclusion rests on a fundamental error in misinterpreting the fault element for the offence of online child luring. Simply put, child luring is not a negligence-based offence any more than sexual assault or sexual interference could be described as such. When an accused fails to raise a reasonable doubt as to mistaken belief in consent under s. 273.2(b) of the *Code,* in the sense that it is not supported by reasonable steps (i.e., the Crown proves beyond a reasonable doubt that the accused did not take reasonable steps to ascertain consent), it does not mean that he or she was merely negligent in sexually assaulting the victim. Similarly, when the defence of mistake of age fails under s. 150.1(4) of the *Code*, the accused's moral culpability is not properly described as mere negligence in engaging in sexual activity with a child. To paraphrase the language in *R. v. Creighton*, we cannot say that these accused harmed their victims unintentionally.

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[49] *R. v. Alicandro supra*, at para. 31; *R. v. Legare supra*, at paras. 31-35.
[50] AR, Vol. I, Tab 4, OCA decision, at para. 121, citing *R. v. Creighton*, [1993] 3 S.C.R. 3, at p. 46.

72. While the requirement to take reasonable steps to ascertain the interlocutor's age in s. 172.1(4) introduces an objective element, the Court of Appeal erred in concluding that fault thereby becomes objective, at the level of mere negligence. Even as the Court of Appeal acknowledged that the fault element is not merely objective, which allows the provision to pass constitutional muster, the decision repeatedly states that negligence is sufficient to support a conviction, and that an accused may be convicted simply for being negligent.[51]

73. The one-year minimum sentence would never apply to someone who is merely negligent, in the sense that it cannot be said that they believed their interlocutor was underage, or that they did not intend to facilitate a sexual offence against a child. These are two requirements of a conviction under s. 172.1 of the *Code*. If found guilty, *ipso facto* the accused must have believed the interlocutor was underage, and he or she must have communicated with the purpose of facilitating a sexual offence.

74. Accordingly, the moral culpability for the offence of child luring does not stretch on a spectrum from mere negligence, on the one hand, and the deliberate targeting of children online, on the other hand. Rather, the relevant moral culpability for this offence is narrowly defined in terms of communicating *for the purpose of facilitating a specific sexual offence with the belief that the person so targeted is underage*. This is an objectively based belief. Where the defence of mistaken belief in age fails, as in this case, all that is left is the accused's unsupported bald assertion that he believed he was communicating with an adult. This alone does not raise a reasonable doubt as to the fault requirement and cannot serve to diminish the moral blameworthiness for the offence.

b. The Applicable Sentencing Range and the Appropriate Sentence in this Case

75. The fundamental error in misinterpreting the accused's culpability in this case undermines the trial judge's determination of the appropriate sentence. By endorsing the

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[51] AR, Vol. I, Tab 4, OCA decision, at paras. 96, 103, 121.

same misperception, the Court of Appeal failed to see the error in principle and upheld the conclusion that a fit sentence in this case was four months. A proper calibration of the respondent's moral blameworthiness for this offence, which is typically high, triggers the applicable sentencing range of at least 12 to 24 months, established in the jurisprudence quite apart from the enactment of the mandatory minimum sentence. An appropriate sentence in the circumstances of this case is in the mid-reformatory range. As a result, the one-year mandatory minimum sentence is not grossly disproportionate as applied to this offence and this offender.

76. The Court of Appeal described the respondent's level of fault by stating that he did not believe his interlocutor was underage and that he did not knowingly communicate to facilitate the commission of a sexual offence against a child. The Court thereby echoed the trial judge's view that the respondent was merely indifferent to the age of his interlocutor and that he did not have the subjective intent to prey on children.[52] As discussed above, if that were the case, the respondent would have to be acquitted of the luring offence. The absence of belief that the interlocutor is underage or the absence of intent to facilitate a sexual offence with regard to that person would preclude a finding of guilt.

77. Not only is this characterization of culpability contrary to the explicit statutory requirements of the offence, but this purported state of indifference about the age of his interlocutor is both practically implausible and unsupported by any evidence in this case. As a matter of common sense and human experience, it is difficult to see how someone engaged in a highly sexualized chat like the respondent could be utterly indifferent as to whether or not his interlocutor is a child.

78. Moreover, there was no basis for this finding of indifference in the evidence at trial or on sentencing. It is well-established that it is an error of law to make a factual finding for which there is no evidence. Further, a disputed finding of fact on sentencing

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[52] *Ibid.* at paras. 131-132; AR, Vol. I, Tab 3, Reasons for S. 12 *Charter* Ruling and Sentence, at paras. 72, 94.

that mitigates the seriousness of the offence has to be established on the evidence on a balance of probabilities.[53] In this case, the respondent did not testify that he was indifferent to Mia's age. Rather, his testimony was that he believed throughout that she was an adult woman. The trial judge rejected his testimony and did not give any credit to the accused's assertion to that effect.

79. It appears that the trial judge concluded that the respondent was indifferent as to Mia's age based on his statement to the police that he did not know whether or not Mia was a child. This lack of actual knowledge about the identity of his interlocutor is understandable in the context of internet chats. However, it does not say anything about the respondent's belief. It certainly does not mean that the respondent did not care whether or not Mia was a child, or that he did not turn his mind to the question of age. Indeed, the latter suggestion is simply untenable given that the respondent was told repeatedly that Mia was only 14.

80. Finally, the trial judge's finding that the respondent had an intention to meet Mia in person provides a further illustration of the absurdity involved in holding that he was indifferent about her age. For sentencing purposes, the trial judge found that the respondent "had an intention to meet and that intention would have been realized if Mia had expressed a greater degree of receptiveness to the idea."[54] The notion that the accused could be utterly indifferent in this context makes no sense. It is practically inconceivable that the respondent would intend to have an in-person sexual encounter with Mia and yet be indifferent as to whether she was a 14-year-old girl or an adult woman. The trial judge's failure to address this clear inconsistency demonstrates yet again the pervasive error involved in misinterpreting the moral culpability inherent in the offence of child luring.

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[53] *R. v. J.M.H.*, 2011 SCC 45, at para. 25; *R. v. Smickle*, 2013 ONCA 678, at paras. 17-18.
[54] AR, Vol. I, Tab 3, Reasons for S. 12 *Charter* Ruling and Sentence, at para. 62.

81. Given the clear impact that this error had on the sentence imposed, the trial judge's determination of the appropriate sentence is not entitled to deference.[55] Moreover, once the respondent's level of culpability is properly seen as that inherent in this offence, which is typically high in having a subjective intent to facilitate the commission of a sexual offence against a 14-year-old child, the applicable sentencing range is at least 12 to 24 months, quite apart from any statutory mandatory minimum sentence. This range emerged from judicial decisions in Ontario pre-2006. Subsequently, in *R. v. Woodward,* Moldaver J.A. (as he then was), emphasized that this range "needs to be revised upwards given the 2007 amendments to the *Code,* doubling the maximum punishment for luring from five to 10 years."[56]

82. Instead of seeking guidance from this jurisprudence, the trial judge in this case did not even mention or attempt to distinguish the decision in *Woodward.* Nor is there any basis on which to confine the sentencing range outlined therein to cases where online luring leads to further serious sexual offences committed against actual children. Such cases obviously attract much higher penitentiary global sentences, particularly in light of the additional offences. It may very well be that a sentence at the top end of the range is warranted for luring in such serious cases, but this does not thereby call into question the very existence of a sentencing range. The appellant's position is that a review of trial decisions where the offence was committed after 2007, but before 2012 to attract the mandatory minimum sentence, supports a sentencing range of 12 to 24 months for child luring in comparable circumstances to this case.[57]

83. The appellant notes that there are few, if any, mitigating factors in this case, other than the absence of a criminal record. The respondent did not plead guilty or express any remorse. There was no evidence as to his risk to re-offend or rehabilitation prospects.

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[55] *R. v. Lacasse,* 2015 SCC 64, at paras. 11, 44.
[56] *R. v. Woodward,* 2011 ONCA 610, at paras. 57-58; *See also R. v. Jarvis* (2006), 211 C.C.C. (3d) 20 (Ont. C.A.), at para. 31; *R. v. Dragos,* 2012 ONCA 538, at para. 81.
[57] *R. v. McCall,* 2011 BCPC 143; *R. v. Walther,* 2013 ONCJ 107; *R. v. Dobson,* 2013 ONCJ 150; *R. v. Holland,* 2011 ONSC 1504; *R. v. Bergeron,* 2009 ONCJ 104; *R. v. Gucciardi,* 2017 ONCJ 770.

The absence of further aggravating factors, such as the actual or attempted commission of other sexual offences, cannot count in mitigation. On the other hand, the respondent's conduct was persistent, explicit and unmistakably aimed at exploiting a child's vulnerability online for his own sexual gratification, as well as grooming her for a potential meeting at a location of his choosing. A mid-reformatory sentence is an appropriate sentence in the circumstances of this offence and this offender, with the result that the mandatory minimum of one year is not a grossly disproportionate sentence on the facts of this case.[58]

3. The One-Year Mandatory Minimum Sentence Is Not Grossly Disproportionate in Reasonably Foreseeable Cases

84. Looking beyond the facts of the present case, the offence of child luring under s. 172.1(1)(b) generally captures conduct displaying a high degree of moral culpability with the potential for causing serious harm to children. The mandatory minimum sentence is consistent with the broader legislative sentencing approach to sexual crimes against children. The heightened level of moral culpability and the potential harm inherent in this offence ensure that it does not cast a wide net. To that extent, the mandatory minimum sentence would never apply to an offender with little to no moral fault or one who poses no danger to the public. As such, it does not impose a grossly disproportionate penalty in any reasonably foreseeable application of the offence.

a. The Gravity of the Offence

85. As discussed in detail above, the moral culpability for the offence of child luring is narrowly defined at a high level of moral blameworthiness which requires a specific subjective *purpose of facilitating a specific sexual offence with the belief that the person so targeted is underage.* While the s. 12 *Charter* analysis is usually limited to the offence facilitated in this case,[59] namely invitation to sexual touching under s. 152 of the

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[58] If the appeal is successful with a resulting increase in the respondent's sentence to reflect the one-year mandatory minimum term, the appellant is content that this Court may stay the execution of the sentence to avoid re-incarcerating the respondent.

[59] *R. v. Brown*, [1994] 3 S.C.R. 749, at p. 751; *R. v. Nur*, 2013 ONCA 677, at paras. 123-128.

Criminal Code, it is significant to note that all the other enumerated offences in s. 172.1(1)(b) constitute serious offences against children under 16 years of age.

86. The other enumerated offences are as follows: sexual interference (s. 151), bestiality (s. 160(3)), indecent exposure of genitals to a person under 16 years of age (s. 173(2)), sexual assault (s. 271), sexual assault with a weapon, threats to a third party or causing bodily harm (s. 272), aggravated sexual assault (s. 273), and abduction (s. 280). While there is undeniably some variation in their relative gravity, the moral culpability inherent in an intent to facilitate any one of these offences remains particularly elevated. Given that by definition child luring involves the intent to facilitate a sexual offence against a child, the offence cannot be said to capture a wide spectrum of moral culpability. Simply put, this provision will never capture a situation of internet child luring involving little or no moral fault.

87. In terms of the harm targeted by the offence of child luring, all the enumerated offences in s. 172.1(1)(b) essentially involve the sexual exploitation of children. The magnitude of harm against children sought to be prevented by s. 172.1(1)(b) is thus beyond dispute. In keeping with Parliament's objective "to close the cyberspace door before the predator gets in to prey", s. 172.1(1)(b) is an inchoate or preparatory offence that criminalizes conduct that precedes the commission of further sexual offences. "By criminalizing conduct that is preparatory to the commission of the designated offences, Parliament has sought to protect the potential child victims of those designated crimes by allowing the criminal law to intervene before the actual harm caused by the commission, or even the attempted commission, of one of the designated offences occurs."[60]

88. In cases such as the present one, s. 172.1(1)(b) also applies to communications with an undercover police officer posing as a young person. As the jurisprudence has pointed out, this is hardly surprising given that children cannot be expected to police the internet. To that extent, it is true that there is no evidence of actual harm to individual

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[60] *R. v. Alicandro supra*, at para. 20; *R. v. Legare supra*, at para. 25.

children. However, the potential harm is the same, and it is inherent in the type of communications criminalized by s. 172.1(1)(b). In this case, the trial judge accepted that the internet "dialogue has the potential to disrupt and distort the emotional equilibrium and the sexual maturation processes of a 14 year old female." Similarly, the Court of Appeal also recognized that "the catastrophic consequences for child victims of internet luring are widely accepted and acknowledged."[61]

89. In spite of these observations, the decisions below erroneously concluded that there is a wide variability in the degree of harm or potential harm inherent in the offence of child luring. The trial judge cited several factors as contributing to this variability, namely the content of the communication, the length of time over which it takes place, the degree to which it advances along the continuum of preparation toward the commission of a further sexual offence, and whether the communication is abandoned prior to or as a result of the accused being arrested.[62]

90. Taking further steps toward the commission of a secondary sexual offence would provide grounds for laying additional criminal charges, such as attempted or actual sexual assault or sexual interference. The offence of luring, however, is complete at the point of communication and does not require any such additional steps. Similarly, the timing of the arrest may provide evidence of additional offences committed or attempted by the accused, but it does not change the nature of the harm attributable to child luring itself. In other words, such considerations do not suggest that the luring offence itself is committed in a variety of ways, but only that the accused may and often does go on to commit additional related offences.

91. While it is obvious that there will be some variation in the precise content and length of the communications captured by this section, this is no different than any other criminal offence which necessarily entails some variation in the actual facts of any given

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[61] *R. v. Alicandro supra*, at para. 38; AR, Vol. I, Tab 3, Reasons for S. 12 *Charter* Ruling and Sentence, at para. 77; AR, Vol. I, Tab 4, OCA decision, at para. 101.
[62] AR, Vol. I, Tab 3, Reasons for S. 12 *Charter* Ruling and Sentence, at para. 71.

case. However, this practical reality does not necessarily entail that there is a broad variation in the types of conduct captured by the offence in question or in the degree of harm it seeks to combat.

92. The offence of child luring does not require sexually explicit language. Although such language is often part of the communication at issue, a sexual predator may lure children for sexual purposes by gaining their trust through innocuous conversations.[63] Just as the content can be overtly sexual or more subtly insidious, the culpable communication can be concentrated in a few exchanges or persistent over an extended period of time. Nonetheless, this does not result in a broad overall spectrum of prohibited conduct, in the sense that some of these communications would cause little to no harm to the targeted children. Rather, from a normative standpoint, all such communications are equally repugnant and pose an undeniable danger to victimize children and exploit their vulnerabilities.

b. The Sentencing Regime for Related Crimes

93. The 2012 amendments which introduced the one-year mandatory minimum applicable in this case brought the offence of child luring in line with virtually all other sexual offences against children under the age of 16, which all attract mandatory minimum sentences. The similar sentencing regime applicable to all these offences reflects the heightened moral blameworthiness inherent in child luring, placing it on a par with related sexual crimes. Child luring requires a specific subjective intent in acting with the *purpose* of facilitating a sexual crime against an underage victim. The mandatory minimum applicable to luring thus reflects the higher moral culpability involved in making the deliberate choice to use the anonymity of the internet to ensnare children with a plan to victimize them sexually.

94. The heightened level of moral fault in child luring corresponds to the insidious nature of internet communication which presents a unique opportunity for sexual

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[63] *R. v. Legare supra*, at para. 29.

predators, and thus creates a distinct danger of child sexual exploitation. The trial judge failed to recognize this distinct danger and erroneously compared child luring to the offence of providing sexually explicit material to a child in s. 171.1 of the *Code*, which only attracts a 90-day minimum sentence when prosecuted by indictment. By contrast to the simple act of sending a sexually explicit photo, communications can mask predatory intent and are essential to establishing a rapport with the intended victim. Communications can be seemingly innocuous but persistent, causing victims to let their guard down and creating the illusion of safety, understanding, and support. To that extent, they are far more insidious than flashing an image on a computer screen.[64]

95. Images can serve as adjunct to the communication, rather than vice-versa. It is the communication that is the predator's main weapon in luring children on the internet, as reflected in the offence committed by the respondent in this case. In this sense, the respondent's culpability is not equivalent to providing sexually explicit material, as he would not have been able, by means of sexual images alone, to continuously engage with Mia for several months to the point of proposing an actual meeting. The higher mandatory minimum applicable to the respondent's offence of child luring appropriately reflects the aggravated nature of his conduct and moral culpability.

c. Hypothetical Scenarios

96. While the decisions below have not discussed hypothetical applications of the offence, some hypothetical scenarios have been posited by the respondent and mentioned briefly by the trial judge. In particular, the trial judge alluded to a hypothetical devised in an earlier decision in *R. v. S.S.*[65] The appellant's position is that the reliance on *R. v. S.S.* is misplaced, inasmuch as that decision dealt with an offence under s. 172.1(1)(a) of the *Code,* which refers to communications for the purpose of facilitating a different set of designated offences against a person *under the age of 18 years.* Whether or not a sentence of one year would be grossly disproportionate in that context is not at issue in

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[64] *R. v. Paradee*, 2013 ABCA 41, at paras. 11-12.
[65] *R. v. S.S.*, 2014 ONCJ 184, at para. 58; AR, Vol. I, Tab 3, Reasons for S. 12 *Charter* Ruling and Sentence, at para. 102.

the present case.[66] The moral culpability of an offence under s. 172.1(1)(a) is different in terms of both the nature of the further sexual offence being facilitated and the age of the complainant. In particular, by contrast to subsection (a), s. 172.1(1)(b) captures an intent to facilitate a sexual offence against a child who is under the age of consent.

97. In relation to s. 172.1(1)(b), the Nova Scotia Court of Appeal recently considered in *R. v. Hood* a hypothetical scenario involving a high school teacher texting her 15-year-old student for the purpose of arranging a sexual encounter.[67] Contrary to the holding in *Hood*, the appellant respectfully submits that a one-year sentence would not be grossly disproportionate in these circumstances. Even taking into account potential mitigating factors about this hypothetical offender, such as mental health concerns and an expression of remorse, the offence of facilitating a sexual encounter with a 15-year-old student in breach of trust warrants a significant custodial term. Indeed, anything short of a custodial sentence would be abhorrent to Canadian society as failing to meaningfully protect children from sexual abuse.

98. The other hypothetical scenarios invoked by the defence in this case were built on the assumption that the accused did not subjectively believe the target of his or her communication to be underage or did not take sufficient steps to ascertain the interlocutor's age. However, a proper interpretation of this statutory provision undermines the notion that an offender could have no subjective intention to facilitate a sexual offence against a child, or that he or she could be merely indifferent about targeting a child. A subjective purpose to facilitate a sexual offence against someone under 16 years of age is the *sine qua non* for a conviction under s. 172.1(1)(b). Once the analysis is properly focused on the reasonably foreseeable applications of the offence committed by the respondent, namely luring a child under the age of 16 for the purpose of facilitating a sexual offence, it becomes apparent that a minimum sentence of one year is not grossly disproportionate either in the respondent's case or in any other reasonably foreseeable situation of comparable moral culpability.

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[66] *R. v. Brown supra* at p. 751; *R. v. Nur*, 2013 ONCA 677, at paras. 123-128.
[67] *R. v. Hood*, 2018 NSCA 18, at paras. 150-154.

4. Alternatively, if the One-Year Mandatory Minimum Sentence Is Found to Infringe S. 12 of the *Charter,* the Appropriate Remedy Is to Read in the Mandatory Minimum Sentence on Summary Conviction

99. In the event that the one-year mandatory minimum under s. 172.1(2)(a) is found to be a grossly disproportionate sentence in some reasonably foreseeable cases, the appellant submits that the available remedies under s. 52(1) of the *Constitution Act, 1982* are not limited to striking down the mandatory minimum sentence for all future offences prosecuted by indictment. The appellant acknowledges that this Court in *R. v. Ferguson* held that, if a mandatory sentence is found to infringe s. 12 of the *Charter*, striking it down is ordinarily the appropriate remedy. In particular, the Court rejected the option of a constitutional exemption from the mandatory term in exceptional cases. At the same time, the Court reaffirmed the availability of "reading in" as a constitutional remedy provided that the following guidelines are met:

> This Court has thus emphasized that in considering alternatives to striking down, courts must carefully consider whether the alternative being considered represents a lesser intrusion on Parliament's legislative role than striking down. Courts must thus be guided by respect for the role of Parliament, as well as respect for the purposes of the *Charter*: *Schachter v. Canada,* [1992] 2 S.C.R. 679; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Sharpe*, 2001 SCC 2. …
> When a court opts for severance or reading in as an alternative to striking down a provision, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court by means of severance or reading in.[68]

100. While clearly rejecting constitutional exemptions from a mandatory minimum sentence on a case-by-case basis, *Ferguson* dealt with a mandatory minimum sentence for a strictly indictable offence. As a result, the Court did not address the present situation where a hybrid offence is punishable by mandatory custodial terms on both modes of procedure. The appellant's position is that in such a case an appropriate remedy is to read in the applicable mandatory minimum sentence when the offence is prosecuted by summary conviction. Provided that the lower mandatory minimum is not a grossly disproportionate penalty, this remedy furthers both the legislative objective and

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[68] *R. v. Ferguson*, 2008 SCC 6, at paras. 50-51.

the purposes of the *Charter* by preserving a constitutionally compliant minimum sentence for the serious offence of using the internet with the purpose to prey on children.

101. The offence of online child luring is a hybrid offence attracting mandatory minimum sentences both by indictment and on summary conviction. This is a significant feature distinguishing this case from the offences at issue in *Nur* and *Lloyd.* The controlled substances offence in *Lloyd* was straight indictable. In *Nur,* the hybrid offence of unauthorized gun possession was punishable by a minimum sentence of three years by indictment and by no minimum penalty on summary conviction. In both cases, this Court struck down the mandatory terms of imprisonment given the wide net cast by the provisions at issue in capturing a minor drug offence driven by addiction or a regulatory licensing infraction, in *Lloyd* and *Nur* respectively. At this very low end of the culpability spectrum in both cases, no mandatory jail sentence would have been appropriate. Therefore, striking down the mandatory minimum sentence was the only available constitutional remedy.

102. By contrast, the offence at issue in this case does not capture such a wide spectrum of varying degrees of fault. On any view of the moral culpability for this offence, it involves a subjective intent to facilitate a sexual offence against a child, for which a mandatory minimum term of imprisonment generally remains appropriate. Even if a one-year sentence is found to be grossly disproportionate in some instances, there is no question that a lesser term of imprisonment is nonetheless appropriate. The trial judge held as much in this case by essentially stating that the 90-day mandatory minimum sentence by summary conviction would have been constitutionally unproblematic.[69]

103. Reading in a reference to this mandatory minimum term avoids the incongruous result of having no mandatory minimum sentence when the offence is prosecuted by indictment, while the same offence on summary conviction would be punishable by a

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[69] AR, Vol. I, Tab 3, Reasons for S. 12 *Charter* Ruling and Sentence, at para. 92. The mandatory minimum sentence on summary conviction was subsequently increased to six months, the constitutionality of which has yet to be decided in a future case.

minimum jail term. At the same time, it is significant to note that this is not a constitutional exemption which would change the nature of the legislation to create something different than Parliament intended.[70] Nor does it involve any uncertainty as to whether Parliament would have passed this measure, given that Parliament did actually enact the lower mandatory minimum penalty.[71] In this sense, the proposed remedy is more consistent with Parliament's intent in prescribing a mandatory term of imprisonment for all instances of this offence. The appellant submits that this remedy represents a lesser intrusion on the role of the legislature than striking down entirely the provision for a mandatory custodial term when the offence is prosecuted by indictment.

PART IV: SUBMISSIONS ON COSTS

104. The Attorney General for Ontario submits that no costs should be awarded.

PART V: ORDER SOUGHT

105. It is respectfully requested that the appeal be allowed, the declaration of invalidity made by the Ontario Court of Appeal be set aside, and that ss. 172.1(3) and 172.1(2)(a) of the *Criminal Code* be declared consistent with the *Canadian Charter of Rights and Freedoms*.

ALL OF WHICH is respectfully submitted by:

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Andreea Baiasu
Counsel, Attorney General for Ontario

DATED at Toronto, this 22nd day of February, 2018

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[70] *R. v. Ferguson supra*, at paras. 54-56.
[71] *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 698-700; *R. v. Sharpe supra*, at paras. 114, 121, 124.

PART VI: AUTHORITIES CITED

SECONDARY SOURCES **Paragraphs**

CANADIAN LEGISLATION **Paragraphs**

Criminal Code, R.S.C., 1985, c. C-46

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*

Appendix “A”

File No. 37687

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Respondent on C61097/
Appellant on C61110)

- and –

DOUGLAS MORRISON

Respondent
(Appellant on C61097/
Respondent on C61110)

NOTICE OF CONSTITUTIONAL QUESTION
(Pursuant to Rule 33(2) of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that I, Andreea Baiasu, counsel for the Attorney General for the Province of Ontario assert that the appeal raises the following constitutional questions:

(1) Does the presumption of belief in age in s. 172.1(3) of the *Criminal Code* infringe the right to be presumed innocent under s. 11(d) of the *Charter*?

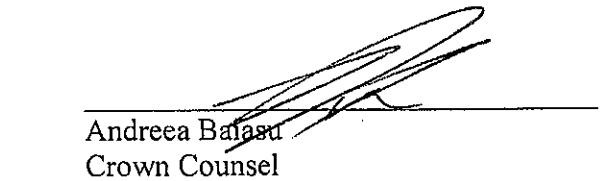
(2) If there is a s. 11(d) infringement, is it justified under s. 1 of the *Charter?*

(3) Does the mandatory minimum sentence of one year under s. 172.1(2)(a) of the *Criminal Code* infringe the right not to be subjected to cruel and unusual punishment under s. 12 of the *Charter*?

AND TAKE NOTICE that an Attorney General who intends to intervene with respect to these constitutional questions may do so by serving a notice of intervention in Form 33C on all

other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

DATED at Toronto, this 21ST day of December, 2017



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