File Number: 37687

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent / Cross-Appeal)
[Respondent on C61097
Appellant on C61110]

- and –

DOUGLAS MORRISON

Respondent
(Appellant / Cross-Appeal)
[Appellant on C61097
Respondent on C61110]

- and –

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ATTORNEY GENERAL OF BRITISH COLUMBIA
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FACTUM OF THE INTERVENER ATTORNEY GENERAL OF ALBERTA

PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE INTERVENER

PART I: OVERVIEW AND FACTS

A. Overview

1. Sexual predation of children on the Internet is a real and pervasive danger in our society. Parliamentarians have answered the cry to protect children from this evil by creating specific offenses for sexual activities with children and mandating minimum sentences of imprisonment.

2. The offense of child luring via telecommunication is a relatively new criminal offense. It illustrates Parliament's efforts to protect children from online predators. As the majority of this Court has stated "*the Internet provides fertile ground for sowing the seeds of unlawful conduct on a borderless scale."* [1]

3. Mandatory minimum sentences have recently been proclaimed for such offenses. These are important indications of the seriousness of these offenses and the harm that offenders cause to children, families and society.

4. Policing of sexual offenses on children is much different today than 25 years ago. The police officer who once physically patrolled the playgrounds looking for predators who lurked after children now uses a computer terminal. The guardian who once ensured that their children were supervised at the playground now has an infinite number of digital locations to supervise.

5. Although the worldwide Internet has had many positive effects on society such as enhancing communication and the productivity of economies, it has a dark side. This is populated by anonymous individuals who engage in insidious activities from their Internet compatible device. Despite the best efforts of law-makers and courts to control this dark side, the predation of our children continues.

B. Facts

6. The Attorney General of Alberta makes no submissions on the facts of this case.

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[1] *R v. Hamilton*, [2005] 2 S.C.R. 432, 2005 SCC 47 para 30

PART II: ISSUES

7. The Attorney General of Alberta's position on the constitutional questions posed is:

a. The rebuttable presumption of belief in age contained in s. 172.1(3) of the *Criminal Code* **does not** infringe the right to be presumed innocent under s. 11(d) of the *Charter.*

b. If there is a section 11(d) infringement, it **is justified** under section 1 of the *Charter*.

c. The mandatory minimum sentence of one year imprisonment under s. 172.1(2) (a) of the *Criminal Code* does **not** infringe section 12 of the *Charter*.

8. The Attorney General of Alberta does not intervene in relation to the constitutional question posed by the Respondent and makes no submissions as to whether s. 172.1(4) of the *Criminal Code* infringes section 7 of the *Charter.*

PART III: ARGUMENT

A. The presumption of belief in age in s. 172.1 (3) of the *Criminal Code* does not infringe the presumption of innocence in s. 11(d) of the *Canadian Charter of Rights and Freedoms*

9. The Attorney General of Alberta asserts that section 172.1 (3) does ***not*** violate the presumption of innocence and adopts the argument advanced by the Appellant Attorney General of Ontario at paragraphs 32 to 42 of its factum.

10. In the present case the Ontario Court of Appeal held that an accused who relies upon an interlocutor's statement of age does not necessarily believe that age to be correct because falsehoods are rampant on the Internet. Thus the presumption of belief in age violates the presumption of innocence.

11. This finding fails to acknowledge that honest and valid information exists on the Internet. Illustrative of this are the various industries that rely upon the Internet on a daily basis, the customers who engage in on-line shopping and banking, and people who reconnect with others on the Internet. It is an exercise in speculation and an over-reach to use a generalized statement about falsehoods on the Internet to invalidate a presumption regarding the accused's belief in the interlocutor's age.

12. The case at bar is unlike *R v. St-Onge Lamoureux* wherein expert evidence was proffered that the possibility of blood alcohol concentration instruments malfunctioning or being used improperly is real and not simply speculative. This was one of the pieces of evidence used by this Court in ruling that the presumptions in s. 258(1) (c) and s. 258(1) (d.01) of the *Criminal Code* infringed s. 11(d) of the Charter.[2]

13. Once the interlocutor in the case at bar said that she was 14 years old this resulted in a *prima facie* establishment of the accused's belief in that age. The ultimate burden of proof never moved to the offender; it always remained with the Crown. This is a rebuttable presumption that is open to refutation by evidence of reasonable steps to ascertain age. The presumption of belief in age does not violate the presumption of innocence.

B. If s. 172.1(3) is held to breach section 11 (d), then the infringement is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*

(1) Factors to be considered in a *Charter* analysis

14. The *Charter* is to be interpreted in light of the context in which it is being applied.[3] The legislative history of the impugned legislation and the social context show that the paramount objective of this legislation is the protection of children from online sexual predation.

(2) Legislative history of the offense of child luring under s. 172.1 of the *Criminal Code*

15. To address the critical need to protect children from online sexual dangers, Parliament first introduced the offence of child luring in an omnibus bill in 2001.[4] Section 172.1 was proclaimed in force on July 23, 2002.[5]

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[2] *R v. St-Onge Lamoureux*, 2012 SCC 57, paras 25, 28

[3] *Edmonton Journal v AB* (Attorney General), [1989] 2 S.C.R. 1326, per Wilson J.'s judgment

[4] Bill C-15A, *Criminal Law Amendment Act*,1st Sess, 37th Parl, 2001; first reading March 14, 2001. Note the Bill was originally introduced as Bill C-15 but was later split by motion, on September 26, 2001, into Bill C-15A and Bill C-15B

[5] *Criminal Law Amendment Act*, 2001, S.C. 2002, c. 13, s. 8 (proclaimed in force on July 23, 2002, as per SI/2002-106, C. Gaz. 2002. II. at 1830)

16. The Legislative summary of the *Criminal Law Amendment Act*, 2001 indicates that the Criminal Code was being amended for the purpose of: "*creating new offences and enforcement measures to deal with sexual exploitation of children, particularly in connection with the Internet.*[6] The breadth of this statement of intent should be noted. As summarized by Sullivan and Driedger,[7] given the traditional importance of legislative intent in interpretation,"… an explanation of purpose that emanates from the legislature itself carries a desirable authority."

17. In presenting the bill to Parliament, the then Minister of Justice and Attorney General of Canada, advised the Senate Standing Committee on Legal and Constitutional Affairs:

> This bill creates the offense of luring. It criminalizes communicating with a child through a computer system for the purpose of facilitating the commission of a sexual offence against a child under 18 years of age…We believe it is important to ensure that we are dealing with luring through the modality of the Internet, to which we all know that more and more of our children, at quite a young age, have access… Hence, we believe it is very important to ensure that Internet luring, as it has become known, is clearly criminalized for the purpose of the protection of our children.[8]

18. Contemporaneous to this bill Canada entered into an Optional Protocol[9] to the United Nations' *Convention on the Rights of the Child* (the "UNCRC").[10] This is one of the most widely ratified and accepted human rights treaties of all time and includes specific sections intended to protect children.

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[6] Canada. Library of Parliament, *Legislative Summary*: *Bill C-15A: An Act to Amend the Criminal Code and to Amend Other Acts* (Ottawa: Parliamentary Research Branch, 2002)

[7] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham, Ontario: Butterworths Canada, 2002) 296 **[Tab A]**

[8] Canada, Parliament, Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, no. 20, December 5, 2001 at 1

[9] *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, GA Res 54/263 (entered into force 18 January 2002); Canada signed on November 10, 2001 and was ratified by Canada on September 14, 2005

[10] *Convention on the Rights of the Child*, GA Res 44/25 (entered into force 2 September 1990)

19. The Preamble to the UNCRC declares: *"the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection."* Of particular note is Article 34 the protection of children from all forms of sexual abuse and exploitation, including the inducement or coercion of a child to engage in any unlawful sexual activity and exploitative use of children in unlawful sexual activities.[11] Similarly, Article 36 speaks of the protection of children from all forms of exploitation.[12]

20. The importance of this legislation is also reflected in the number of international obligations that Canada has entered into with other countries in an effort to combat child predation over the Internet.[13]

21. These international commitments are relevant to the issues in this appeal. Courts have recognized the significance of international obligations in reference to children.[14] If Canadian laws are successfully impugned it is conceivable that Canada will become a safer place for predators to hunt the Internet for unsuspecting children worldwide.

(3) The social context

22. Consider that in the early 2000s when this offense was initially presented to Parliament the number of users of the Internet worldwide was 500.52 million.[15] In 2017 the number had increased to 3.58 billion Internet users worldwide with 320.06 million users in North America.[16]

23. Today the available content on the Internet and its mode of delivery is considerably more advanced than in 2001. For example, most people in 2001 accessed the Internet by a stationary

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[11] Ibid, Article 34

[12] Ibid, Article 36

[13] *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, supra*; European Commission, *Global Alliance against Child Sexual Abuse Online* (December 2013) 5

[14] *R v Schultz*, 2008 ABQB 679 (CanLII) at paras 33-36, 77

[15] Julia Murphy and Max Roser, "Internet," online: Our World in Data https://ourworldindata.org/internet

[16] Statista, "Number of internet users worldwide from 2005 to 2017 (in millions)," online: https://www.statista.com/statistics/273018/number-of-internet-users-worldwide

desktop computer and dial up connection. Broadband connectivity provided easier and quicker access to the Internet but was not readily available until the middle of the 2000s.[17] Wireless delivery is now the norm although in some rural and remote locations, dial up connectivity to the Internet still exists.[18]

24. The proliferation of the Internet has occurred because of improvements in accessibility. Smartphones, mobile tablets, and Wi-Fi capable gaming consoles are relatively new technologies. These devices are more affordable than before which has also added to their increased use.[19] An entire generation has now grown up with the Internet. The digital literacy of the population has thus increased dramatically.

25. Wireless connectivity to the Internet is now available in most public buildings, public transit, parks and playgrounds and in private businesses. According to a newer study "aided by the convenience and constant access provided by mobile devices, especially smartphones, 92% of teens report going online daily – including 24% who say they go online 'almost constantly'."[20]

26. The age of the child accessing the Internet is now younger. One European study "show(s) that the age of first Internet use in Europe is falling. On average, children aged 9-16 first used the Internet when they were 9. Younger children tend to go online earlier, with those

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[17] Kate Youde, "Broadband: The First Decade" *Independent* (28 March 2010), online: https://www.independent.co.uk/life-style/gadgets-and-tech/news/broadband-the-first-decade-1929515.html

[18] Matthew Kupfer, "CRTC declares Broadband Internet access a basic service" *CBC* (21 December 2016) online: CBC News www.cbc.ca/news/political/crtc-internet-essential-service-1.3906664

[19] David Nield, "15 Memorable Milestones in Tablet History" Techradar (5 July 2016) online: https://www.techradar.com/news/mobile-computing/10-memorable-milestones-in-tablet-history-924916 ; and Canada, "Communications Monitoring Report 2017: Canada's Communication System: An overview for Canadians" online: CRTC https://crtc.gc.ca/eng/publications/reports/policymonitoring/2017/cmr2.htm

[20] Amanda Lenhart, "Teens, Social Media & Technology Overview 2015," (Pew Research Center: April 2015) 2.

aged 9-10 saying that they first used the Internet at age 7, while the average age of first use among older teenagers is 11."[21]

27. The dangers that were so apparent when the offense of sexual luring of children was first debated are broadly present in today's world. We must all be diligent in protecting children from the predators who lurk anonymously on the Internet.

28. A comprehensive study titled *Online Grooming of Children for Sexual Purposes: Model Legislation and Global Review* states:

> These reports demonstrate that children around the world have integrated the Internet into their lives in a way that may still be incomprehensible to many adults. Children today use the Internet every day not only to communicate with one another, but also to establish and maintain relationships with others, their social spheres often spanning both online and offline without any clear separation between the two.[22]

29. Organizations have been created that educate and protect children from online sexual predators. Examples include the Canadian Coalition against Internet Child Exploitation ("CCICE")[23] and Beyond Borders ECPAT Canada.[24] Cybertip.ca was formed as Canada's

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[21] Giovanna Mascheroni, Maria Francesca Murru & Anke Gorzig, "Varieties of access and use" in Sonia Livingstone, Leslie Haddon & Anke Gorzig, eds., <*children, risk and safety on the internet*> (Great Britain: The Policy Press, 2012) 64 **[Tab B]**

[22] International Centre for Missing and Exploited Children, *Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review*, 1st ed (Virginia, 2017) 2.

[23] This is a multi-sector group of industry, government, non-governmental and law enforcement stakeholders from across the country. Its mandate is to devise and implement an effective national strategy to help remove the scourge of child exploitation from the Internet while continuing to preserve and promote use of the Internet for the free flow of legitimate and wide-ranging information, entertainment and educational content. CCICE formed in 2004 https://www.cybertip.ca/app/en/media_release_ccaice_action_plan_highlights

[24] Beyond Borders ECPAT Canada is a national, bilingual advocacy organization advancing the rights of children everywhere to be free from sexual abuse and exploitation. It is a registered charity without political or religious affiliation: http://www.beyondborders.org/en/home/

tipline for reporting online child sexual exploitation in September 2002 by the Canadian Centre for Child Protection. [25]

30. The Government of Alberta has created education tools for children, teens, parents and caregivers. Examples include "Internet Savvy" and badguypatrol.ca.[26]

31. The Government of Canada has recently announced approximately four million dollars in funding over five years to the Canadian Centre for Child Protection to continue its "vital work in protecting children from sexual exploitation on the Internet."[27]

32. Finally the damage that society strives to protect children from is described as:

> A child who has been groomed online may feel responsible for or deserving of the abuse, thus making it more difficult for the child to disclose the abuse. Following a grooming experience, whether online or offline, the child may suffer numerous negative effects such as embarrassment, irritability, anxiety, stress, depression and substance abuse.[28]

33. Therefore, with the proliferation of the Internet the need for protection of children against online sexual luring and exploitation is more profound now than it was at the inception of the impugned offence. It is against this legislative and social background that the analysis as to whether or not the presumption of belief in age in section 172.1(3) of the *Criminal Code* is a reasonable limit on the presumption of innocence must be considered.

34. In undertaking this section 1 analysis, the Attorney General of Alberta will address each separate component of the *Oakes* test which is properly set forth in the Appellant's factum.

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[25] Canadian Centre for Child Protection Inc.: https://www.cybertip.ca/app/en/about

[26] Alberta Government, "Internet Savvy Training," online: http://www.humanservices.alberta.ca/InternetSafety/internetsavvy.html#module1-0

[27] Canada, "Canada Invests Funding to Combat Child Sexual Exploitation on the Internet" (7 February 2018), online: Public Safety Canada: https://www.canada.ca/en/public-safety-canada/news/2018/02/canada_invests_fundingtocombatchildsexualexploitationontheintern.html

[28] International Centre for Missing and Exploited Children, *supra*, 19

(4) The *Oakes* Test

(i) Pressing and Substantial Objective

35. In our society it is our moral and legal duty to protect our children. When an instrument as pervasive as the Internet is involved we as a society must decide that this duty will be of paramount concern. The pressing and substantial objective of this impugned legislation is to protect children both domestically and worldwide.

36. This Court has consistently held that Canadian law must be interpreted to comply with Canada's international treaty obligations, and specifically those relating to the protection of children.[29]

37. The police officers who embark upon these investigations and utilize the "undercover sting operation" to catch an Internet predator are not only protecting domestic children but children worldwide. The Internet has no boundaries.

38. The Respondent does not quarrel that this part of the *Oakes* test is satisfied.[30]

(ii) The Proportionality Analysis

39. The Attorney General of Alberta adopts the Appellant's arguments on the proportionality analysis with a few additions as outlined below.

a. Rational Connection

40. As indicated in the Appellant's materials there is a rational connection between the presumption of belief in age in s. 172.1(3) and protecting children from sexual predation. The Respondent agrees that the impugned legislation is rationally connected to the objective. [31]

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[29] *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] 1 S.C.R. 76 at para 31- 32; *Baker v. Canada* [1999] 2 S.C.R. 817 at paras 69-70.

[30] Respondent's Factum para 28

[31] Respondent's Factum para 28

b. Minimal Impairment

41. The Ontario Court of Appeal commented in the case at bar that there was "no evidence about presumptions under s. 172.1 or the outcomes of sting operations."[32]

42. The offense of child luring is an inchoate offense as compared to the choate offenses at issue in *R v. Whyte*[33]and *R v. Downey*.[34] The two types of offenses are inherently different. Child luring is a preparatory offense whereas impaired driving and living off the avails of prostitution are tangible offenses with actual studies and statistics from which to garner evidence.

43. The evidence that the Court said was lacking in the case at bar is inherently difficult to obtain. While a search could be done for the number of cases charged under section 172.1, an analysis of convictions or acquittals of these charges would not necessarily reflect if the presumption of belief in age was used or not in the disposition. Trial courts have different styles in regard to the provision of reasons. It would be impossible to parse out from the case inventory if the presumption of belief in age was the reason that a prosecution succeeded or failed.

44. It must be remembered that section 172.1(3) involves a rebuttable presumption and that the onus of proof beyond a reasonable doubt never moves from the Crown. Parliament has attempted to strike a balance between the presumption of innocence and the pressing and substantial objective to protect our children from sexual predation with this provision. It is an effort to grapple with the challenges faced with the relatively new phenomenon of sexual offenses committed over the Internet. If this presumption does not stand as a minimal impairment on the presumption of innocence it is difficult to imagine a presumption that would be considered a minimal impairment.

c. Overall Proportionality

45. The salutary effect of this presumption outweighs any deleterious effects. The protection of children from online luring is of paramount importance. If the undercover officer posing as an

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[32] *R v. Morrison*, 2017 ONCA 582 para 66

[33] *R v. Whyte*, [1998] 2 S.C.R. 3

[34] *R v. Downey*, [2012] 2 S.C.R. 10

underage interlocutor is able to save one child from online sexual luring then the provision has had its intended effect.

46. Any deleterious effects are speculative. Evidence to the contrary does not need to come directly from the accused. To override the presumption an accused need only point to evidence capable of raising a reasonable doubt, perhaps from other statements in the telecommunication history or the interpretation of specific words and phrases or the cross examination of the undercover officer.

47. The Attorney General of Alberta therefore submits that the presumption of belief in age is a reasonable limit on the right to be presumed innocent until proven guilty that is justified under section 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 *Canadian Charter of Rights and Freedoms*.

(1) Legislative history of the mandatory minimum sentence

48. It is important to consider the history of section 172.1 *Criminal Code* and the various amendments to the minimum and maximum sentences.

49. In recent years Parliament has repeatedly increased mandatory minimum sentences for sexual offences against children, including section 172.1 *Criminal Code*. Until October 31, 2005, there was no minimum penalty for luring and the maximum was 5 years imprisonment. On November 1, 2005, minimum penalties were first introduced for this offence: 45 days imprisonment on indictable proceedings, and 14 days imprisonment for summary proceedings.[35] On August 9, 2012, the minimum sentences were increased to one year imprisonment for indictable proceedings and 90 days imprisonment for summary proceedings.[36] Most recently, on July 17, 2015, the maximum penalties were increased to 14 years imprisonment on indictable proceedings and 2 years less one day imprisonment on summary proceedings.[37]

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[35] *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 2005, c. 32, s. 3

[36] *Safe Streets and Communities Act*, 2012, c.1, s.13

[37] *Tougher Penalties for Child Predators Act*, 2015, c.23, s. 14

50. These changes signal Parliament's evolving view that sexual offences with child victims call for increasingly serious penalties. They also accord with a growing societal recognition that people who utilize the Internet in such a dangerous and manipulative fashion should be subject to **serious** consequences.

(2) The First Stage of the Section 12 Analysis: The Particularized Inquiry

51. The sentence imposed upon the Respondent of 75 days imprisonment plus one year probation failed to consider or give proper effect to the *specific intent required for luring of a child.* This requires the offender to focus on an objective to further the immediate one at hand, while general intent offences require only a conscious doing of the prohibited act.[38] A high degree of moral blameworthiness is involved.

52. There are no "low-culpability or small offenders" amongst those convicted of child luring. The Court in *R v. Horswill*[39] expressed a similar sentiment in commenting that a conviction for sexual interference, which is also a specific intent offense, "necessarily entails that there will have been a finding of a deliberate act and an interference with the sexual integrity of a child, for a sexual purpose."

53. Given the specific intent required for a conviction for luring of a child, as well as the inherent exploitation, the vulnerability of the child victim, and the high moral culpability of the adult involved it cannot be said that the one year mandatory minimum sentence is so excessive as to outrage the standards of decency.

(3) The second stage of the s. 12 analysis: The Reasonable Hypotheticals

54. Although the sentencing judge was not required to consider reasonable hypotheticals in the present case given his decision on the particularized inquiry, he saw fit to mention a "reasonable hypothetical" based upon a prior sentencing decision. The Respondent has also provided three hypotheticals at page 37 and 38 of his factum.

55. At issue is the manner in which sentencing courts construct a ***reasonable*** hypothetical. In *R v. Nur* this Court directed that reasonable hypotheticals cannot be "fanciful or remote

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[38] *R v. Daley*, [2007] 3 S.C.R. 523 at para 35

[39] *R v. Horswill*, 2017 BCSC 35 at para 81 **[Tab 1]**; *R v. Horswill*, 2018 BCCA 148

situations." The exercise must be "grounded in experience and common sense. Laws should not be set aside on the basis of mere speculation."[40]

56. The three hypotheticals posed by the Respondent do not meet this test. Numbers one and two do not disclose a criminal offence because of the limited nature of the discussion. The statement "You should touch yourself, that would be fun" is ambiguous at best and not sexual in nature. There is no secondary sexual offense disclosed in the telecommunication. A reasonable hypothetical must disclose a criminal offense.

57. The third hypothetical posited by the Respondent focusses on "unreasonable indifference" or negligence of the fictional accused. This dismisses the analysis of specific intent that is required for the offense under s. 172.1. It is not useful to advance a reasonable hypothetical that does not involve the same type of intent as the impugned offense and its mandatory minimum penalty. Such a comparison would be incongruent as there would be significant differences between the offenses such as in the elements required to be proven and the level of moral blameworthiness of the offender.

58. The proposed hypotheticals in the case at bar reflect some of the difficulties encountered by sentencing courts when constructing reasonable hypotheticals. Such difficulties have been illustrated in a number of cases decided since *R v. Nur* and *R v. Lloyd*. [41]

59. For example, in Alberta a mandatory minimum penalty of one year imprisonment when the Crown proceeds by indictment for sexual exploitation pursuant to section 153 of the Criminal Code has been declared to be unconstitutional. In *R v. EJB*[42] the 35 year old offender was convicted of sexual exploitation of his 16 year old niece. The two had sexual intercourse six times over two months. The sentencing judge imposed a conditional sentence order of two years less one day. The Crown has appealed asserting *inter alia* that the sentencing judge erred in declaring the mandatory minimum sentence to be unconstitutional based upon two reasonable hypotheticals.

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[40] *R v. Nur*, 2015 SCC 15 at para 62

[41] *R v. Lloyd*, 2016 SCC 13

[42] *R v. EJB*, 2017 ABQB 726

60. In the discussion of reasonable hypotheticals the sentencing judge referenced other decided cases. This is similar to the case at bar where the sentencing judge alluded to a decided case.[43]

61. In *R v. EJB*, the sentencing judge held that the one year mandatory minimum sentence was not grossly disproportionate in reference to the actual offender. However, she held that it was grossly disproportionate in regards to two reasonable hypotheticals which were apparently based upon decided cases. The Crown appellant asserts that she erred in relying upon cases that did not deal with the same offense and intent as EJB's offense as well as in deviating far from the facts of the decided cases when she crafted the reasonable hypotheticals.

62. In drafting the first hypothetical the sentencing judge used a decided case that did not involve the same offense. Rather than sexual exploitation the decided case dealt with sexual assault and invitation to sexual touching.[44] To compare a sexual exploitation conviction with a sexual assault conviction is incongruent as the elements of the offense and the intent of the offenses are different.

63. Surely if a decided case is used to construct a reasonable hypothetical then the offense must be the same as the offence involved in the challenge to the mandatory minimum penalty.

64. The second decided case that the court used in *R v. EJB* dealt with sexual exploitation. The facts that the sentencing judge indicated were based on that decided case were far removed from the actual facts of the case.[45] The reasonable hypothetical that was crafted stated that a 60 year old teacher allowed a 17 year old student to momentarily touch her breasts over her clothing. The actual facts of the decided case dealt with a teacher who engaged in sexual texting with his student over a number of hours; never resulting in sexual touching.

65. If a decided case is to be used to construct a reasonable hypothetical then the facts of the decided case should not be deviated from in a significant fashion. To do otherwise cannot be

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[43] Appellant's factum para 96

[44] *R v. L.(C)*, 2013 ONSC 277

[45] *R v. Careen*, 2012 BCSC 918

what was intended when this Court said in *R v. Nur* and in *R v. Morrisey* [46] that decided cases can be used in fashioning hypotheticals but they "must be used with caution as a starting point and additional circumstances can be added to the scenario to construct an appropriate model."[47]

66. The Attorney General of Alberta suggests that caution must be used in the construction of a reasonable hypothetical in the context of a constitutional challenge to a mandatory minimum penalty. In addition to the parameters outlined in *Nur* and *Lloyd*, it is important that the reasonable hypothetical discloses a criminal offense with the same intent as the specific impugned offense. A general intent offence cannot ground a reasonable hypothetical when the mandatory minimum penalty for a specific intent offense is at issue. If the court uses decided cases as a foundation for the reasonable hypothetical the actual facts of those cases cannot be deviated from in a significant fashion. Finally, if a court holds that the mandatory minimum sentence in the particularized inquiry of a specific case amounts to a grossly disproportionate sentence, then any reasonable hypothetical subsequently addressed needs to be different enough from the actual facts of the case to ground a meaningful analysis.[48]

67. If this Honourable Court upholds the finding in the case at bar that the mandatory minimum sentence of one year imprisonment infringes section 12 of the Charter the Attorney General of Alberta does **not** offer any argument on section 1.

(4) Alternative "Reading in" Remedy

68. Alternatively if the one year mandatory minimum sentence is found to infringe section 12 of the Charter, the Attorney General of Alberta agrees with the alternative remedy proposed by the Appellant.[49] It would be appropriate to read into the penalty section for indictable proceedings the mandatory minimum sentence of 90 days imprisonment for offenses on which the Crown elects summary procedure. This would avoid discordant sentences as between the indictable and summary penalties.

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[47] *R v. Morrisey* 2000 2 S.C. R 90, para 33 and *R v. Nur,* para 62

[48] See *R v. Ford, 2017* ABQB 542 where this was not done and an appeal is pending.

[49] Appellant's Factum paras 99 - 103

PART IV: COSTS

69. Not applicable.

PART V: REQUEST TO PRESENT ORAL ARGUMENT

70. Pursuant to Rule 71(5.2) of the *Rules of the Supreme Court of Canada,* Alberta is prepared to present oral argument no longer than 5 minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 9th day of May, 2018.

Deborah Alford

DEBORAH J. ALFORD
COUNSEL FOR THE INTERVENER,
ATTORNEY GENERAL OF ALBERTA

PART VI - TABLE OF AUTHORITIES

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