File No.

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

B E T W E E N:

HER MAJESTY THE QUEEN

Applicant

- and –

DOUGLAS MORRISON

Respondent

APPLICANT'S MEMORANDUM OF ARGUMENT

PART I
OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Applicant's Position

1. The Court of Appeal for Ontario struck down the presumption regarding belief in age in s. 172.1(3) of the *Criminal Code* as an infringement on the right to be presumed innocent under s. 11(d) of the *Charter*, which could not be demonstrably justified under s. 1 of the *Charter*. This conclusion goes against the overwhelming weight of post-*Oakes* appellate jurisprudence on s. 11(d) of the *Charter*. Furthermore, striking down s. 172.1(3) immediately calls into question the validity of identically worded presumptions in related sections of the *Criminal Code* which seek to combat internet child exploitation. The holding of the Court of Appeal undermines the effective enforcement and prosecution of these offences, which is a matter of national importance for Canadian society. As this Honourable Court has emphasized, the offence of child luring under s. 172.1 of the *Code* is a law enforcement tool serving "to close the cyberspace door before

the predator gets in to prey." The presumption in s. 172.1(3) is a key legislative component in facilitating this goal.

2. Further, it is the applicant's position that the Court of Appeal erred in striking down the mandatory minimum sentence of one year for the offence of child luring when prosecuted by indictment under s. 172.1(2)(a) of the *Criminal Code.* The Court of Appeal found that the minimum sentence constituted a grossly disproportionate punishment contrary to s. 12 of the *Charter* when applied to offences of mere negligence. This erroneous holding has far-reaching implications in misconstruing the *mens rea* for child luring and diluting the moral blameworthiness for this offence generally for sentencing purposes. Moreover, this case presents an opportunity to clarify the s. 12 *Charter* analysis and available remedies in the context of a hybrid offence punishable by mandatory terms of imprisonment on both modes of procedure. The Court of Appeal's s. 12 analysis raises issues of general application and national importance that require correction and guidance from this Honourable Court.

B. Factual Background

3. 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 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, and that she meet him at a particular location. Ultimately, however, the meeting did not occur. The respondent's sexually explicit directions continued through March and April. He repeatedly invited Mia to touch herself sexually, to send him explicit photos, and to watch pornography on her computer.

4. 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. When PC Hutchinson told him that the police received a complaint that he was speaking on the internet to a 14-year-old girl for a sexual purpose, the respondent's answer was 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. 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.

C. The Rulings at Trial

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

6. 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.[1] Subsection (3) provides that a representation that the computer interlocutor is underage is, in the absence 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.

7. 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

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1 *R. v. Morrison,* Reasons for *Charter* Ruling on Ss. 171.1(3) and (4), *per* Gage J., December 10, 2014, Application Record, Tab 3.

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 in s. 172.1(1) will not be excused by a bald and unsupported assertion that the accused believed he was communicating with an adult.

8. 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

9. 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.[2] 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 engaged with another adult in the exploration of a role-play fantasy, and that the respondent's police statement makes no mention of role playing with an adult because it did not reflect his true state of mind.

10. 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

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2 *R. v. Morrison,* Reasons for Judgment on Conviction, *per* Gage J., January 16, 2015, Application Record, Tab 4.

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.

11. 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

12. 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.[3]

13. 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.

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[3] *R. v. Morrison,* Reasons for S. 12 *Charter* Ruling and Sentence, *per* Gage J., September 8, 2015, Application Record, Tab 5.

C. 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*

14. 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."[4]

15. 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 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.

16. Echoing the trial judge's observation that the common sense inference of belief from representation would suffice, Pardu J.A. concluded that the absence of the presumption would not undermine the prosecution of this offence inasmuch as the Crown can ask the trier of fact to infer belief from the record of the online exchange, which is generally adduced at trial. In conclusion, Pardu J.A. was "not persuaded that the

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[4] *R. v. Morrison,* 2017 ONCA 582, at paras. 57-61 (hereinafter "OCA decision"), Application Record, Tab 6.

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."[5]

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

17. 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.[6]

18. In the discussion of *mens rea,* Pardu J.A. went on to explicate criminal liability under s. 172.1 as follows:

> [I]n the context of sting operation, [where] the sexual purpose is evident from the text of the communication, criminal liability will likely turn on two issues:
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> 1. Firstly, has the Crown proven that the accused subjectively believed his interlocutor was underage? The Crown could not prove this without some evidentiary foundation for such a belief, such as a representation made to the accused. If the Crown establishes beyond a reasonable doubt that the accused believed his interlocutor was underage, a conviction will follow.
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> 2. Secondly, where the Crown is unable to establish this subjective belief, the issue of reasonable steps arises. Even in the absence of proof of a belief that the other person was underage, the accused will be convicted if the Crown proves that he did not take reasonable steps to ascertain the age of the other person. This will occur in a context where there is some evidence that could lead an accused to believe his interlocutor was underage.
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5 *Ibid.* at para. 73.

6 *Ibid.* at paras. 94, 110.

> A failure to take the steps expected of a reasonable person is by definition negligence and may be sufficient to support a conviction where, as above, the communication envisaged by s. 172.1 and the invitation proscribed in s. 152 are co-extensive.[7]

19. As Pardu J.A. acknowledged at the end of the reasons on s. 7 of the *Charter,* this interpretation of criminal liability under s. 172.1 plays a crucial role in rendering unconstitutional the mandatory minimum sentence of one year. "As discussed below, the possibility that a person accused of child luring may be convicted where it is proven beyond a reasonable doubt that he or she failed to take reasonable steps to support a belief that that other participant was of legal age – that he or she was negligent – has consequences for the constitutional validity of the mandatory minimum sentence."[8]

3. The Mandatory Minimum Sentence

20. 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 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". [9][Emphasis added]

21. 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, 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. ...

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7 *Ibid.* at paras. 95-96.
8 *Ibid.* at para. 103.
9 *Ibid.* at para. 121.

> 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.
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> Application of the mandatory minimum to such a wide range of behaviour would result in sentences that are grossly disproportionate for some individuals. The Supreme Court has held in *Nur* and *Lloyd* that mandatory minimum prison sentences having this character are more prone to infringe s. 12 of the *Charter*.[10][Emphasis added]

22. As a result of finding a constitutional violation on the facts of this case, the Court of Appeal did not need to consider reasonable hypothetical scenarios for the application of the mandatory minimum sentence.

PART II
QUESTIONS IN ISSUE

23. This case raises the following issues of public importance:

(1) Did the Court of Appeal err in finding that the presumption of belief in age in s. 172.1(3) of the *Criminal Code* infringes the right to be presumed innocent under s. 11(d) of the *Charter*?

(2) In the alternative, if there is a s. 11(d) infringement, did the Court of Appeal err in finding that it is not justified under s. 1 of the *Charter?*

(3) Did the Court of Appeal err in declaring the mandatory minimum sentence of one year under s. 172.1(2)(a) of the *Criminal Code* to be of no force or effect as infringing the right not to be subjected to cruel and unusual punishment under s. 12 of the *Charter*?

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10 *Ibid.* at paras. 131-32.

PART III
STATEMENT OF ARGUMENT

A. The Court of Appeal Erred in Finding that the Presumption of Belief in Age in S. 172.1(3) of the *Criminal Code* Infringes the Right to Be Presumed Innocent under S. 11(d) of the *Charter*

24. Section 172.1(3) of the *Criminal Code* 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. The Court of Appeal erred in interpreting this presumption by failing to take into account the purpose and context of the statutory provision in which it 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 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 interlocutor to be underage.

25. 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.[11]

26. 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.

27. 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. 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."[12]

28. 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.

29. 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 true beliefs. In essence, the

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11 *R. v. Audet,* [1996] 2 S.C.R. 171, at para. 44; *R. v. Downey*, [1992] 2 S.C.R. 10, at para. 33.

12 *R. v. Legare,* 2009 SCC 56, at paras. 25-26; *R. v. Levigne,* 2010 SCC 25, at paras. 24-28.

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. A belief in this context will be necessarily imperfect, based on mere representations, but he or she will form a belief about the age of the interlocutor and will continue to communicate on the strength of that belief.

30. 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 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.

31. When considered in its proper context, the presumption passes constitutional muster, as Durno J. held in *R. v. Ghotra,* a recent decision from the Ontario Superior Court of Justice, which the Court of Appeal failed 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.[13]

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13. *R. v. Ghotra,* 2016 ONSC 1324, at para. 125.

B. In the Alternative, if S. 172.1(3) Infringes the Presumption of Innocence, the Court of Appeal Erred in Finding that the Infringement Was Not Justified under S. 1 of the *Charter*

32. 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 test which requires that (a) it be rationally connected to the objective; (b) impair the right in question as little as possible; and (c) have deleterious effects that are proportional to the salutary effects and the importance of the legislative objective.[14]

33. As the Court of Appeal acknowledged, with regard to the first requirement of the test, 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. S. 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."[15]

34. 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."[16]

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14 *R. v. Oakes,* [1986] 1 S.C.R. 103, at paras. 69-71; *R. v. Laba,* [1994] 3 S.C.R. 965, at para. 79.

15 *R. v. Legare supra* at paras. 25-26; *R. v. Levigne supra,* at paras. 24-28; *R. v. Alicandro,* 2009 ONCA 133, at para. 36.

16 *R. v. Levigne supra,* at paras. 25-29; *R. v. Alicandro supra,* at para. 38.

35. 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".[17]

36. Despite clear direction from this Honourable Court as to the importance of the state objective in combatting child 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.

37. 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.[18] 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 simply argue on appeal that acquittals are unjustified, let alone to use this argument to justify a constitutional infringement. Compiling a record of 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.

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17 *R. v. Levigne supra,* at para. 30.

18 OCA Decision, at para. 73.

38. 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.[19] 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.

39. By failing to uphold the presumption as minimally infringing on the s. 11(d) *Charter* right, the Court 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.[20]

40. 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.[21]

41. 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*. The only significant decision to

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19 *Ibid.* at para. 72.

20 *R. v. Downey*, [1992] 2 S.C.R. 10, at para. 52.

21 *R. v. Nagy*, [1988] O.J. No. 1832 (C.A.), at p. 12.

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.[22]

42. 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 require an accused to raise a reasonable doubt.[23] The Court of Appeal clearly erred in failing to make any reference to prior jurisprudence, or any attempt to distinguish and justify the different result in the present case.

43. Finally, the applicant points out that the declaration of invalidity in this case will likely impact the validity of the identically worded presumptions in ss. 171.1(3) and 172.2(3) of the *Criminal Code*. These are related offences of making sexually explicit material available to a child, and agreeing or arranging, by means of telecommunication, to commit a sexual offence against a child. The decision of the Court of Appeal in this case may also invite renewed s. 11(d) *Charter* challenges to provisions of the *Criminal Code* containing similar presumptions which have been previously upheld by the courts. The applicant submits that these potentially wide-ranging consequences militate in favour of granting leave to appeal in this case.

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22 *R. v. St-Onge Lamoureux*, 2012 SCC 57, at paras. 37-49, 59, 64-67.

23 *R. v. Downey supra; R. v. Laba supra; R. v. Nagy supra; R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Gosselin*, [1988] O.J. No. 1921 (C.A.); *R. v. Curtis*, [1998] O.J. No. 467 (C.A.); *R. v. Slavens*, [1991] B.C.J. No. 692 (C.A.); *R. v. Singh*, 2005 BCCA 591.

C. The Court of Appeal Erred in Declaring the Mandatory Minimum Sentence of One Year under S. 172.1(2)(a) of the *Criminal Code* to Be of No Force or Effect as Infringing the Right Not to Be Subjected to Cruel and Unusual Punishment under S. 12 of the *Charter*

44. The applicant's position is that Court of Appeal erred in concluding that the mandatory minimum sentence of one year under s. 172.1(2)(a) of the *Code* infringed s. 12 of the *Charter* in that it applied to offenders whose degree of fault was at the level of mere negligence. Doing away with the presumption regarding belief in age led the Court of Appeal to further err in interpreting the *mens rea* for the offence of child luring, and consequently the moral blameworthiness inherent in the offence. As a result, the Court of Appeal erroneously struck down the mandatory minimum sentence of one year on the ground that it applied to a wide spectrum of moral culpability, including offences of mere negligence.

45. The Court of Appeal found the mandatory minimum sentence constitutionally suspect in that it applied to offenders who are merely negligent and thus less blameworthy than those who deliberately set out to lure a child online. Painting these offenders with the same brush was seen to run counter to the cautionary words of McLachlin J., as she then was, in *R. v. Creighton* to the effect that "those causing harm intentionally must be punished more severely than those causing harm unintentionally".[24]

46. The applicant submits that this holding rests on a fundamental error in misinterpreting the *mens rea* for the offence of 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 was merely negligent in sexually assaulting the victim. Similarly, when the defence of mistake of age fails under s. 150.1(4), the accused's moral culpability is not properly described as being

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[24] OCA decision, at para. 121, citing *R. v. Creighton,* [1993] 3 S.C.R. 3, at p. 46.

merely negligent in having sex with a minor. To paraphrase the language in *Creighton*, we cannot say that these accused harmed their victims unintentionally. Yet, that is precisely how the Court of Appeal characterized the moral culpability for child luring in this case.

47. 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 merely for being negligent.[25]

48. The one-year minimum sentence would never apply to someone who is merely negligent, in the sense that it cannot be said that he believed his interlocutor was underage, or that he 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 his interlocutor was underage, and he must have communicated with the purpose of facilitating a sexual offence.

49. Contrary to the conclusion of the Court of Appeal, 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, all that is left is the accused's unsupported bald assertion that he believed he was talking to 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.

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[25] OCA decision, at paras. 96, 103, 121.

50. The applicant's position is that the Court of Appeal erred in finding that a one-year sentence was grossly disproportionate in the instant case due to the accused's reduced culpability at the level of mere negligence. As a result of this finding, the Court of Appeal did not go on to consider the application of the mandatory minimum sentence in other reasonably foreseeable situations.

51. If this Honourable Court agrees that the holding of the Court of Appeal was in error, this Court will need to consider the wider application of the one-year mandatory minimum sentence for the offence of child luring when prosecuted by indictment. The applicant submits that this represents an opportunity for this Honourable Court to clarify the s. 12 *Charter* analysis and available remedies in the context of hybrid offences punishable by mandatory terms of imprisonment on both modes of procedure. In *R. v. Nur*, this Court found unconstitutional the three-year mandatory minimum sentence for an offence under s. 95 of the *Criminal Code* when prosecuted by indictment, where the same offence prosecuted by summary conviction attracted no minimum sentence.[26] By contrast, the instant offence under s. 172.1 of the *Code* was punishable at the relevant time by a minimum sentence of one year by indictment, and by a mandatory minimum of 90 days on summary conviction.

52. If granted leave to appeal, the applicant proposes to submit that, 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 available remedies under s. 52(1) of the *Constitution Act, 1982* are not limited to striking down the mandatory minimum sentence for all future s. 172.1 offences prosecuted by indictment. Striking down the mandatory minimum of one year leads to 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 minimum of 90 days in jail.

53. Where the offence in question is a hybrid offence prescribing a lower mandatory minimum sentence on summary conviction, the proposed remedy for a s. 12 *Charter*

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[26] *R. v. Nur*, 2015 SCC 15.

violation would be to read down the minimum sentence as an indictable offence to the mandatory minimum on summary conviction where required to avoid grossly disproportionate sentences. The applicant's position is that this outcome would be more consistent with Parliament's intent in prescribing a specific mandatory minimum sentence for all instances of the offence.

PART IV
COSTS

54. The applicant makes no submissions as to costs.

PART V
ORDER REQUESTED

55. The applicant requests that the application for leave to appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

Andreea Baiasu
Counsel for the Applicant

Dated at Toronto this 4th day of August, 2017.

PART VI
TABLE OF AUTHORITIES

PART VII
STATUTES AND REGULATIONS

***Criminal Code* (R.S.C., 1985, c. C-46) – Effective between February and May 2013**

Luring a child	**Leurre**
172.1 (1) Every person commits an offence who, by a means of telecommunication, communicates with	**172.1** (1) Commet une infraction quiconque communique par un moyen de télécommunication avec :
(a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence under subsection 153(1), section 155, 163.1, 170 or 171 or subsection 212(1), (2), (2.1) or (4) with respect to that person;	a) une personne âgée de moins de dix-huit ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée au paragraphe 153(1), aux articles 155, 163.1, 170 ou 171 ou aux paragraphes 212(1), (2), (2.1) ou (4);
(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 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person; or	b) une personne âgée de moins de seize ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée aux articles 151 ou 152, aux paragraphes 160(3) ou 173(2) ou aux articles 271, 272, 273 ou 280;
(c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under section 281 with respect to that person.	c) une personne âgée de moins de quatorze ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée à l'article 281.
Punishment	*Peine*
(2) Every person who commits an offence under subsection (1)	(2) Quiconque commet l'infraction visée au paragraphe (1) est coupable :
(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	a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an;
(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	b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois, la peine minimale étant de quatre-vingt-dix jours.

imprisonment for a term of 90 days.	*Présomption*
Presumption re age	(3) La preuve que la personne visée aux alinéas (1)a), b) ou c) a été présentée à l'accusé comme ayant moins de dix-huit, seize ou quatorze ans, selon le cas, constitue, sauf preuve contraire, la preuve que l'accusé la croyait telle.
(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.	*Moyen de défense*
No defence	(4) Le fait pour l'accusé de croire que la personne visée aux alinéas (1)a), b) ou c) était âgée d'au moins dix-huit, seize ou quatorze ans, selon le cas, ne constitue un moyen de défense contre une accusation fondée sur le paragraphe (1) que s'il a pris des mesures raisonnables pour s'assurer de l'âge de la personne.
(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.	**Rendre accessible à un enfant du matériel sexuellement explicite**
Making sexually explicit material available to child	**171.1** (1) Commet une infraction quiconque transmet, rend accessible, distribue ou vend du matériel sexuellement explicite :
171.1 (1) Every person commits an offence who transmits, makes available, distributes or sells sexually explicit material to	a) à une personne âgée de moins de dix-huit ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée au paragraphe 153(1), aux articles 155, 163.1, 170 ou 171 ou aux paragraphes 212(1), (2), (2.1) ou (4);
(a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence under subsection 153(1), section 155, 163.1, 170 or 171 or subsection 212(1), (2), (2.1) or (4) with respect to that person;	b) à une personne âgée de moins de seize ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée aux articles 151 ou 152, aux paragraphes 160(3) ou 173(2) ou aux articles 271, 272, 273 ou 280;
(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 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person; or	c) à une personne âgée de moins de quatorze ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée à l'article 281.

(c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under section 281 with respect to that person.	*Présomption*
Presumption	(3) La preuve que la personne visée aux alinéas (1)a), b) ou c) a été présentée à l'accusé comme ayant moins de dix-huit, seize ou quatorze ans, selon le cas, constitue, sauf preuve contraire, la preuve que l'accusé la croyait telle.
(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 18, 16 or 14 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.	**Entente ou arrangement — infraction d'ordre sexuel à l'égard d'un enfant**
Agreement or arrangement — sexual offence against child	**172.2** (1) Commet une infraction quiconque, par un moyen de télécommunication, s'entend avec une personne, ou fait un arrangement avec elle, pour perpétrer :
172.2 (1) Every person commits an offence who, by a means of telecommunication, agrees with a person, or makes an arrangement with a person, to commit an offence	a) soit une infraction visée au paragraphe 153(1), aux articles 155, 163.1, 170 ou 171 ou aux paragraphes 212(1), (2), (2.1) ou (4) à l'égard d'un tiers âgé de moins de dix-huit ans ou qu'il croit tel;
(a) under subsection 153(1), section 155, 163.1, 170 or 171 or subsection 212(1), (2), (2.1) or (4) with respect to another person who is, or who the accused believes is, under the age of 18 years;	b) soit une infraction visée aux articles 151 ou 152, aux paragraphes 160(3) ou 173(2) ou aux articles 271, 272, 273 ou 280 à l'égard d'un tiers âgé de moins de seize ans ou qu'il croit tel;
(b) under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to another person who is, or who the accused believes is, under the age of 16 years; or	c) soit une infraction visée à l'article 281 à l'égard d'un tiers âgé de moins de quatorze ans ou qu'il croit tel.
(c) under section 281 with respect to another person who is, or who the accused believes is, under the age of 14 years.	*Présomption*
Presumption	(3) La preuve que le tiers visé aux alinéas (1)a), b) ou c) a été présenté à l'accusé comme ayant moins de dix-huit, seize ou quatorze ans, selon le cas, constitue, sauf preuve contraire, la preuve que l'accusé le croyait tel.
(3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to	**Infractions d'ordre sexuel - Inadmissibilité de l'erreur**
	150.1 (4) Le fait que l'accusé croyait que le plaignant était âgé de seize ans au moins au

the accused as being under the age of 18, 16 or 14 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.	moment de la perpétration de l'infraction reprochée ne constitue un moyen de défense contre une accusation portée en vertu des articles 151 ou 152, des paragraphes 160(3) ou 173(2) ou des articles 271, 272 ou 273 que si l'accusé a pris toutes les mesures raisonnables pour s'assurer de l'âge du plaignant.
Sexual offences - Mistake of age	**Exclusion du moyen de défense fondé sur la croyance au consentement**
150.1 (4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.	**273.2** Ne constitue pas un moyen de défense contre une accusation fondée sur les articles 271, 272 ou 273 le fait que l'accusé croyait que le plaignant avait consenti à l'activité à l'origine de l'accusation lorsque, selon le cas:
Where belief in consent not a defence	(a) cette croyance provient:
273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where	(i) soit de l'affaiblissement volontaire de ses facultés,
(a) the accused's belief arose from the accused's	(ii) soit de son insouciance ou d'un aveuglement volontaire;
(i) self-induced intoxication, or	(b) il n'a pas pris les mesures raisonnables, dans les circonstances dont il avait alors connaissance, pour s'assurer du consentement.
(ii) recklessness or wilful blindness; or	
(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.	

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

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. **11(d).** Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. **11(d).** Tout inculpé a le droit d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable. **12.** Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.