File No. 39935

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

BETWEEN:

HIS MAJESTY THE KING, THE ATTORNEY GENERAL OF QUÉBEC

APPELLANTS (Appellants)

-and-

BERTRAND MAXIME MARCHAND

RESPONDENT (Respondent)

-and-

DIRECTOR OF PUBLIC PROSECUTIONS
THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF ALBERTA
THE ATTORNEY GENERAL OF SASKATCHEWAN
NUNAVIK CIVIL LIBERTIES ASSOCIATION
ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE

INTERVENERS

File No. 40093

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

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC, HIS MAJESTY THE KING

APPELLANTS (Appellants)

-and-

H.V.

RESPONDENT (Respondent)

-and-

DIRECTOR OF PUBLIC PROSECUTIONS
THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF ALBERTA
THE ATTORNEY GENERAL OF SASKATCHEWAN

INTERVENERS

FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL OF SASKATCHEWAN

(Pursuant to Rules 37 and 42 of *The Rules of the Supreme Court of Canada)*

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PART I

OVERVIEW

1. The Attorney General for Saskatchewan ("Saskatchewan") is intervening and responding to the Constitutional Questions in *R. v. Marchand*[1] and *R. v. H.V.*[2] regarding the validity of the six month and one year mandatory minimums as contained within ss.172.1(2)(a) and (b) of the *Criminal Code*[3].

2. Saskatchewan respectfully disagrees with the Québec Court of Appeal's conclusions that ss.171.1(2)(a) and (b) infringe s.12 of the *Charter.* The court concluded in *Marchand* that the appropriate sentence for the offender was five months. Then the court simply performed a quantum leap to the conclusion that the one year mandatory minimum was grossly disproportionate. In both decisions, the court's analysis lacked the degree of "deep" and "careful"[4] consideration mandated by the s. 12 test encompassing not only the identification of the appropriate sentencing range following this Honourable Court's direction in *R. v. Lloyd*,[5] but the penological goals of the legislation and the gravity of the offence and the moral culpability of the offender.

3. Saskatchewan submits that the prevailing sentencing jurisprudence in this province reveals that the child luring mandatory minimums are not grossly disproportionate, abhorrent or intolerable such that it outrages the standards of community decency.

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[1] *R. v. Marchand*, 2021 QCCA 1285 ["*Marchand*"]

[2] *R. v. H.V.*, 2022 QCCA 16 ["*H.V.*"]

[3] *Criminal Code*, RSC 1985, c. C-46, as amended ["*Criminal Code*"]

[4] *R. v. Bear,* 2020 SKQB 140 at para [22], 164 WCB (2d) 87

[5] *R. v. Lloyd,* 2016 SCC 13, [2016] 1 SCR 130

PART II

CONSTITUTIONAL QUESTIONS IN ISSUE

4. Did the Québec Court of Appeal err in upholding both trial judges' findings in *Marchand* and *H.V*. that ss. 172.1(2)(a) and (b) of the *Criminal Code* offend section 12 of the *Charter?* Saskatchewan submits the answer is "yes".

5. Saskatchewan abandons its request in the Notice of Intervention to make a s.1 of the *Charter* saving argument.

PART III

ARGUMENT

A. The Analysis on the Part of the Québec Court of Appeal was Flawed

6. Saskatchewan submits the mandatory minimum sentences for child luring do not infringe s.12 of the *Charter.* The Court of Appeal's conclusion to the contrary was flawed by a simple failure to properly apply governing *Charter* principles and an outright failure to conduct the requisite particularized inquiry mandated by law. Considering the gravity of the offence and the moral culpability of offenders who would engage in this offence, neither the six month or the one year mandatory minimum is cruel or unusual.

(i) The Analytical Framework to be Applied

7. An applicant who asserts that a mandatory minimum sentence infringes s.12 of the *Charter* is required to overcome a very high threshold. He or she must do more than simply prove the sentence would be or could be demonstrably unfit, disproportionate or excessive. A cruel and unusual sentence must be shown to be abhorrent and intolerable such that the

sentence would outrage the community's sense of decency were it to be imposed. In fact, the applicant must demonstrate that the sentence is grossly disproportionate.[6]

8. A mandatory minimum sentence represents a "forceful expression of government policy in the area of criminal law"[7] by elected officials who speak on behalf of the Canadian citizens they serve. The enactment of a mandatory minimum sentence represents the considered view of those elected lawmakers with respect to the relative importance of prevention, deterrence, retribution and rehabilitation in relation to certain crimes. Consequently, courts should override such considered views only in the clearest of cases. Just as an appellate court must substantially defer to a sentencing judge's exercise of the broad sentencing discretion in ordinary sentencing cases, substantial deference is also owed to Parliament's expression of policy in the area it has legislated.[8]

9. In s.12 cases, a court must conduct a contextual or particularized inquiry as a first step in deciding the appropriate sentence for the offender before the court. The object of this inquiry is to consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would be appropriate to punish, rehabilitate or deter the specific offender or to protect the public. The court should also consider the actual effect of the punishment on the individual, the penological goals and sentencing principles upon which the sentence is fashioned, the existence of valid alternatives to the punishment imposed and a comparison of punishments imposed for other crimes in the same jurisdiction. At the culmination of this inquiry the Court must ask, considering all of these factors, whether the imposition of the mandatory minimum sentence would be grossly disproportionate.[9]

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[6]*R. v. Morrison,* 2019 SCC 15 at para. [143], [2019] 2 SCR 3; *R. v. Lloyd, supra* footnote 5 at para. [24]; *R. v. Morrisey,* 2000 SCC 39 at para. [26], [2000] 2 SCR 90; *R. v. Smith,* [1987] 1 SCR 1045 at p. 1072, 110 WCB (2d) 398

[7]*R. v. Nur,* 2015 SCC 15, at para [132], [2015] 1 SCR 773

[8]*R. v. Lloyd, supra* footnote 5 at para. [60], *R. v. Goltz,* [1991] 3 SCR 485 at pp. 501-503

[9]*R. v. Morrisey, supra* footnote 6 at paras. [27] to [29]; *R. v. Goltz, ibid* at pp. 499 to 500

10. If the mandatory minimum sentence would not be grossly disproportionate in the individual circumstances of the case, the court must then consider whether it would be in other reasonably foreseeable cases. Reasonably foreseeable hypotheticals or cases cannot include far-fetched, remote or marginally imaginable fact situations.[10]

(ii) The Québec Court of Appeal Treated Both of these Matters as Ordinary Sentence Appeal Reviews

11. In its review of the trial judges' rulings in each case, the Québec Court of Appeal did not conduct the fulsome inquiry that the law requires in a constitutional analysis. Besides failing to consider the actual effect of the punishment on the individual including the prospects for parole and early release that were considered in *R. v. Morrisey,* the court made no effort to consider the penological goals and sentencing principles underlying Parliament's considered view that mandatory minimum sentences should be imposed on those who lure children in order to commit the secondary designated offences - which are all heinous crimes legislated by Parliament to protect children.

12. More importantly, the Québec Court of Appeal did not identify the appropriate range of sentences for similar offenders who commit similar crimes. Instead, the court only focused on whether the sentence that was imposed by the trial judge was demonstrably unfit. After resorting to principles that are normally applied in ordinary sentence appeal reviews, the Court of Appeal in *Marchand* concluded that a sentence of five month's imprisonment for child luring, *concurrent* to the sexual interference sentence of ten months, was a fit sentence.[11] The court used this finding as the comparator for its conclusion that s.12 was violated and simply gave its imprimatur to the trial judge's ruling.[12]

13. This is precisely the kind of analysis this Court identified as being improper in *R. v. Goltz:*

> *Smith* makes it plain that gross disproportionality must be determined by paying close attention both to the particular situation in which the offence occurred and to the personal traits of the offender, though it clearly does not

[10] *R. v. Morrisey*, *ibid*, at para. [30]

[11] *R. v. Marchand, supra* footnote 1 at paras. [105] and [112]

[12] *Ibid*, at paras. [121] to [122]

> go as far as a complete individualization of sentencing, which might put into question the constitutional validity of mandatory minimum sentences generally.[13]

14. The constitutional issue at stake cannot be resolved by asking if a lesser sentence would be fit in this case or in any other reasonably foreseeable child luring case. The reason for this is simple: sentencing is an inherently individualized process and a trial judge enjoys a broad discretion in sentencing in all such cases. Therefore, there will always be a relatively broad range of appropriate fit sentences for similar cases involving similar offenders. As stated by this Court, "the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction".[14]

15. Therefore, even if the Québec Court of Appeal in *Marchand* was correct in holding that a five month sentence would be fit in the circumstances of this case for the child luring offence, that conclusion says nothing about whether a higher sentence would have been demonstrably unfit or, more to the point, grossly disproportionate. The Court could not avoid conducting the kind of particularized inquiry mandated by the *R. v. Goltz* and *R. v. Morrisey* rulings by resting its conclusion on ordinary appellate review principles common to ordinary sentence appeal cases.

16. The Québec Court of Appeal should have considered whether the appropriate range of fit sentences for this kind of offence committed by this type of offender rendered the mandatory minimum sentence grossly disproportionate. Had the court asked itself this question, it would have inevitably concluded the mandatory minimum of 12 months did not infringe s.12. That much is clear from a close reading of the authorities cited by the appellant in their factum at paragraph [79], and footnote 108, which underline the sentencing threshold in Québec to be twelve to twenty-four months for this offence.

17. Pursuant to the guidance given in *R. v. Barton*[15], the province of Saskatchewan intervenes to discuss the fact that in its sentencing rulings, the Saskatchewan Court of Appeal has

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[13] *R. v. Goltz*, *supra* footnote 8 at p. 503

[14] *R. v. M. (C.A.),* [1996] 1 SCR 500 at para. [92], 30 WCB (2d) 177

[15] *R. v. Barton*, 2019 SCC 33 at paras. [52] and [53], [2019] 2 SCR 579

focused on the continued and repeated emotional manipulation that is behind the offence of luring. The essence of luring is the manipulation of a defenseless and vulnerable child at the hands of an adult for the adult's perverse sexual pleasure. That is why the offence is seen in this province as being a very grave offence and, accordingly, the moral culpability of any individual who would engage in this offence is seen to be high.

18. *R. v. Miller*[16] is a case that bears an astonishing similarity to the case at bar. The offender in this matter was also 19 years of age at the material time and without a prior record of criminal convictions. He suffered from significant health issues as the result of spina bifida from birth. The complainant was a 13 year old female child. The offender pled guilty to one count of child luring and one count of sexual assault. He was sentenced by the sentencing judge to fourteen months for the sexual assault and nine months concurrent for the offence of luring.

19. The luring in this case involved the offender meeting the child on an online chat line where he obtained her cell phone number and he was able then to text her thereafter. Over the course of one month, the offender honed in on the vulnerability of the child who had just lost her father figure, her grandfather. During the course of their texting, the child was assured that it would be appropriate for her to call the offender "Daddy" and the texting became more and more sexualized as the complainant developed a deepening and increasing dependency on the offender. The offender persuaded the child to engage in sexual acts with him online and eventually, in person. The relationship had a duration of several months until it was caught and stopped.

20. What is remarkable about the fact situation in *R. v. Miller*, not just that it is so similar to the facts in *Marchand*, but also because the offender became upset with the child in the instances where she refused to pose nude. His "pretend" rejection of the child was hurtful and led to her emotional dependence on him which, in turn, deepened the increasingly toxic and sexual nature of their relationship.[17] In *Marchand,* the offender used similar tactics.

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[16]*R. v. Miller,* 2016 SKCA 32, 128 WCB (2d) 521

[17]The facts are set out from the trial reasons in paragraph [2] of the Court of Appeal ruling, *Ibid*.

He used the luring to prolong the relationship with a child that had cooled once she realized she was being used. It is the use of the internet to get a foothold in order to manipulate and abuse the mind of a child to get sexual needs met that is the core of this offence.

21. The Saskatchewan Court of Appeal noted that luring is a "very serious offence". It varied the global sentence from 14 months to three years – with the sexual assault attracting a sentence of two years and the luring offence receiving the mandatory minimum. The Court noted that this sentence was at the "lower end of the spectrum" but this was only because of the unique health circumstances of the respondent.[18]

22. The Saskatchewan Court of Appeal did not shy away from a particularized analysis of the factors in connection with the offence. The Court was blunt in its assessment of the gravity of the luring offence and the moral culpability of anyone who chose to participate in it. Further, and of real consequence in the matter before this Court, the Saskatchewan Court of Appeal was not undeterred by the fact that this was not a "classic" case of child luring where the child never meets the offender and only participates in an online communication with the offender. Like the offender before this Court, the 13 year old victim in *R. v. Miller* met and knew her oppressor and believed she was engaged in a relationship with him. Also, like the victim in *Marchand*, the victim in *R. v. Miller* was incredibly emotionally attached to the offender and it was this connection that allowed him to continue the abuse:[19]

> [23] One cannot overstate the seriousness of luring as an offence. There is sometimes a belief that anonymity merits no consequences and, therefore, any persuasive techniques are acceptable. The manipulation of vulnerable young people through the anonymity of the Internet is a serious societal problem. Such manipulation will often take place in the safety of the victim's home and in the privacy of their own room. Here anonymity was not a factor but manipulation was. The offence of luring must be assessed as a separate crime and the offender's overall moral culpability for its commission must be reflected in the sentence. The sentencing judge, in this case, erred when he failed to do so. Had he done so, an additional sentence of a minimum of one year for that particular offence in these circumstances would not have been unfit. We note at the time the offences were committed

[18] *R. v. Miller, supra* footnote 16 at para. [2]

[19] *Ibid,* at para. [23]

> there was no minimum sentence for luring. Parliament has now legislated a minimum punishment of one year imprisonment on a conviction for the indictable offence under s. 172.1(2)(a) of the *Criminal Code.*

23. The Saskatchewan Court of Appeal in *R. v. Miller* noted early in the ruling that in imposing a concurrent sentence for luring, the trial judge failed to consider the offence of luring as a discrete and separate offence and this is what led to the demonstrably unfit sentence:[20]

> [20] …Luring is itself a very serious offence and if sentencing on a concurrent basis, as the sentencing judge did here, it ought to have been considered as elevating the overall gravity of the offences and the respondent's moral culpability in their commission. If sentencing on a consecutive basis, as was open to the sentencing judge in the circumstances of this case, an additional sentence over and above the threshold sentence of three years for the sexual assault would have been appropriate. The sentencing judge failed to properly consider the luring charge.

24. The *R. v. Miller* decision was released on March 10, 2016. By July of that same year, the Saskatchewan Court of Appeal confirmed that the sentencing for child luring offences should be sentenced consecutively to the secondary offences. In *R. v. McLean*[21] the Court confirmed its commitment to the principle that the focus of a sentencing hearing for a person who has exploited a child by means of child luring must be on the harm caused to the child by the offender's conduct and the life-altering consequences that flow from it.[22]

25. In *R. v. McLean*, the Saskatchewan Court of Appeal varied a global sentence of two years less a day for a plea of guilt to eleven *Criminal Code* offences involving four victims to a global sentence of three years. There were four luring charges reflecting the four victims. The Court of Appeal reasoned that the offender should be sentenced to *two years each* for the four luring, each to be served concurrently but consecutive with all the other

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[20] *Ibid,* at para. [8]

[21] *R. v. McLean*, 2016 SKCA 93, 132 WCB (2d) 96

[22] *Ibid*, at para. [27]

sentences.[23] The important aspect of this case is that the Saskatchewan Court of Appeal doubled the mandatory minimum and it was only reduced because of the principle of totality. Also the Court affirmed that the luring sentence should be served consecutively to the other sentences because the substance of the luring offence is quite different than the other offences which were all sexual in nature.[24]

26. More recently, the Saskatchewan Court of Appeal has clarified that child luring will, as a rule, be sentenced consecutive to the secondary offences because of the unique aspects of the offence that sets it apart from the other offences on the indictment. In *R. v. Chicoine*[25], the offender pled guilty to 40 sexual offences against children all over the world. The number of total victims was undetectable because of the online nature of the luring. The offender repeatedly solicited the mothers of the children online to act as accomplices with him in the sexual acts which he directed from his bedroom in his apartment. The Saskatchewan Court of Appeal varied the total sentence from twelve years to fifteen and, in so doing, approved of the sentencing judge's decision to apportion one year consecutive for each of the luring offences for each of six victims.[26]

27. There are several very important aspects of this case that are directly relevant to the matters before this Court. The first is the fact that the highest court in Saskatchewan agreed that the one year mandatory minimum was an appropriate *minimum* sentence for a charge of child luring. Saskatchewan is a province where child luring is sentenced according to the

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[23]The rest of the charges reflected the various secondary offences in which the offender abused his victims and the total sentence in this case was 6 years. However, applying the principle of totality, the Court of Appeal reduced the sentence to three years.

[24]*Ibid*, at para. [83]

[25]*R. v. Chicoine*, 2019 SKCA 104, 159 WCB (2d) 641

[26]There were seven counts of luring in all because there was two separate charges of luring for one of the victims. The two pleas of guilt on luring with respect to this one victim were sentenced as one year each, concurrent to each other but consecutive to the other five luring charges on the indictment. In total, of the 15 year sentence, the offender received 6 years for the 6 child luring pleas of guilt. *R. v. Chicoine*, *ibid*, at paras. [113] and [132]

gravity of the offence and the moral culpability of the offender such that sentences for the indictable offence range from the one year mandatory minimum to 24 months, similar to the appellant's assessment of the province of Québec.

28. The second principle is that child luring, because of the unique aspects of the offence, must be sentenced consecutively to other offences on an indictment.[27]

29. Third, contrary to the Québec Court of Appeal in *H.V.* that cast doubt on the evidence of the harm done to the victim,[28] courts in Saskatchewan have firmly and comprehensively addressed the extent to which sexual abuse affects not only children, but society at large. The Saskatchewan Court of Appeal in *R. v. L.V.*[29] stressed the need for sentencing courts to apply a "harm-based lens" to child sexual offences.

B. Addressing the Concerns in *R. v. Morrison*

30. In the *R. v. Morrison* decision, the majority of this Court believed it was unwise to rule on the constitutional validity of the one year mandatory minimum under s.172.1(2)(a) because the parties to that litigation did not have the benefit of the clear statement from this Court as to the high level of *mens rea* required for a conviction in child luring offences.[30] Having said that, the majority of this Court noted two aspects of the legislation that caused concern that the subsection may be, at the very least, "constitutionally suspect". In particular, the majority highlighted the following issues: (a) there is considerable variation in terms of the conduct and circumstances that may be caught by the internet luring offence;[31] and (b) by enacting a lower mandatory minimum sentence for luring offences prosecuted as summary conviction rather than indictable offences, Parliament has openly acknowledged

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[27] *Ibid*, at para. [95] and see for instance, *R. v. Winsley*, 2019 SKQB 218 at para. [130], 158 WCB (2d) 667 that followed *R. v. Miller*, supra footnote 16

[28] *R. v. H.V.*, *supra* footnote 2 at para [47]

[29] *R. v. L.V.*, 2016 SKCA 74, at paras. [102] and [104], [2017] 1 WWR 439

[30] *R. v. Morrison*, supra footnote 6 at para. [145]

[31] *Ibid*, at para. [148]

that there will be circumstances in which the application of the higher mandatory minimum will be harsher than necessary.[32] Saskatchewan responds to those concerns as follows.

(i) A Contextual Consideration of the "Considerable Variation" Does not Support a Conclusion the Mandatory Minimum May be Grossly Disproportionate

31. Some of the variation the majority referred to concerned the age of potential victims. However, the varying ages of potential victims according to s.172.1(1) is a product of the underlying secondary sexual offences the internet luring offence is intended to prevent. For instance, the victim's age specified in s.172.1(1)(c), which applies to luring for the purpose of facilitating an abduction of a child under 14, necessarily is defined by the child abduction offence created by s.281 – this is the offence the luring offence is meant to prevent.

32. For children under the age of 16, all of the secondary designated offences listed in s.172.1(1)(b) require the victim to be less than 16. The following table outlines the secondary designated offences that specifically apply to victims who are under 16 years of age:

Section	Offence	Details of Delict	Mandatory Minimum
s.151	**Sexual Interference**	The touching of a part of the body of a person under 16 for a sexual purpose by an adult	Indictable election – 1 year Summary conviction – 90 days
s.152	**Invitation to Sexual Touching**	An invitation on the part of an adult to a person under 16 to touch a part of the body for a sexual purpose	Indictable election – 1 year Summary conviction – 90 days
s.160(3)	**Bestiality**	Committing bestiality in the presence of someone under the age of 16 years or inciting someone under 16 years of age to commit bestiality.	Indictable election – 1 year Summary conviction – 6 months

[32] *Ibid*, at para. [151]

Section	Offence	Details of Delict	Mandatory Minimum
s.173(2)	**Indecent Act**	Exposing one's genitals for a sexual purpose to a person under 16 years of age.	Indictable election – 90 days Summary conviction – 30 days
s.271	**Sexual Assault**	The sexual assault of a person under 16 years of age.	Indictable election – 1 year Summary conviction – 6 months
s.272	**Sexual Assault with a Weapon/Bodily Harm**	The sexual assault of a person under 16 years of age with a weapon; sexual assault of a person under 16 years of age causing bodily harm.	Mandatory Minimum – 5 years [s.272 (2) (a.2)]
s.273	**Aggravated Sexual Assault**	Committing a sexual assault that wounds, maims, disfigures, or endangers the life of a person under 16.	Mandatory Minimum – 5 years [s.273 (2) (a.2)]
s.280	**Abduction**	The taking of a person under the age of 16 years of age from a parent or guardian without lawful authority.	None

33. When it comes to victims under 18 years of age, the list of possible secondary designated offences in s.172.1(1)(a) are all linked in one fundamental way – they are all offences that are sexual in nature with underaged victim targets. The following table sets these offences out with the applicable mandatory minimums. Not all of these offences are specifically written to apply to children under 18 years of age. That is why this age group is more comprehensive and that is why the list of secondary designated offences are broader in scope. However, all of these offences, no matter what the age of the child, deal with contemptible and destructive sexual conduct and they *all* apply to *all* children under 18 years of age:

Section	Offence	Details of Delict	Mandatory Minimum
s.153(1)	**Sexual Exploitation**	The touching of a part of the body of a person under 18 for a sexual purpose by an adult or counselling a person under 18 to	Indictable election – 1 year

Section	Offence	Details of Delict	Mandatory Minimum
		touch for a sexual purpose – this offence also requires a breach of trust on the part of the offender.	Summary conviction – 90 days
s.155	**Incest**	Sexual intercourse with a blood relationship under 18 years of age	None[33]
s.163.1	**Child Pornography**	s.163.1(3) - Transmitting Child Pornography s.163.1(4) – Possessing Child Pornography s.163.1(4.1) – Accessing Child Pornography	Mandatory Minimum – 1 year Indictable election – 1 year Summary conviction – 6 months Indictable election – 1 year Summary conviction – 6 months
s.170	**Parent/Guardian Procuring Sexual Activity**	A parent or guardian who procures a person under the age of 18 to engage in any sexual activity with another adult	Mandatory Minimum – 1 year
s.171	**Householder Permitting Prohibited Sexual Activity**	A householder or manager of a premises who knowingly permits a person under 18 years of age to be in the premises for the purposes of sexual activity.	Mandatory Minimum – 1 year
s.279.011	**Trafficking of a Person Under 18**	Trafficking a person under 18 years of age for the purpose of exploiting them or facilitating their exploitation.	Mandatory Minimum – 6 years if the victim dies or suffers aggravated assault [s.279.011(1)(a)] Mandatory Minimum - 5 years in any other case [s.279.011(1)(b)]

[33]If the child is under the age of 16 years, s.155(2) specifies a mandatory minimum of 5 years.

Section	Offence	Details of Delict	Mandatory Minimum
s.279.02(2)	**Receiving Material Benefit from Trafficking Person Under 18**	Receiving a financial or material benefit knowing it comes directly from an offence in s.279.011	Mandatory Minimum – 2 years
s.279.03(2)	**Withholding or Destroying Documents to Assist Trafficking Person Under 18**	Assisting the offence in s.279.011 by withholding or destroying travel documents, documents that establish identity or immigration status.	Mandatory Minimum – 1 year
s.286.1(2)	**Obtaining the Sexual Services of a Person Under 18 for Consideration**	Obtaining or communicating for consideration the sexual services of a person under 18 years of age.	Mandatory Minimum – for a first offence – 6 months For each subsequent offence – 1 year
s.286.2(2)	**Receiving a financial benefit from the offence in s.286.1(2)**	Receiving a financial benefit as the direct result of the sexual services of a person under the age of 18 years.	Mandatory Minimum – 2 years
s.286.3(2)	**Procuring a person under the age of 18 years to provide sexual services for financial consideration.**	Includes the recruiting, harbouring, holding or concealing of a person under the age of 18 years; also includes the exercising of control, direction or influence over the movements of a person under 18 years old all connected to the procuring of sexual services from the child victim.	Mandatory Minimum – 5 years

34. The mere variation in the ages of the victims protected by the luring offence does not support a finding of *Charter* violation. Neither does the fact that children and underage victims may be sexually exploited, abused or harmed in different ways. A case of a teacher luring a 17 year old student to facilitate the sexual exploitation of the student will obviously be factually different than a stranger who attempts to persuade a child to post nude photographs or meet up for a sexual liaison, but those variations cannot and do not detract

from an inescapable conclusion: all of the designated secondary offences listed in s.172.1(1) are serious crimes in their own right and cannot be committed by the morally "innocent".

35. In *R. v. Morrison,* the majority suggested a factual scenario that might undermine this submission. It involved a 21 year old person who engaged in internet luring by means of sending one text message to a 15 year old child. With respect, Saskatchewan sees nothing in that example to undermine the validity of the mandatory minimum sentence for luring. The actual or potential harm to a child or underaged person who is subject to internet luring cannot be defined by the age of the offender or even the number of luring messages. The 21-year-old offender in the example provided could not be convicted of internet luring unless: a) *he knew the victim was a child* or he failed to take reasonable steps to ascertain the child's age; and b) *he intended to facilitate a sexual crime against the child*. For reasons already given, that is an extraordinarily serious crime involving a high degree of moral culpability regardless of the offender's age or the number of luring messages he sent.

36. Saskatchewan's submissions are supported by two developments since the *R. v. Morrison* decision was released by this Court. On December 21, 2021 the government introduced Bill C-5 which proposes to eliminate some 14 mandatory minimum sentences from the *Criminal Code*. The targeted offences involve firearm and firearm-related matters. Importantly, this bill does not propose to remove the mandatory minimums from child luring and it leaves intact all of the mandatory minimums listed for *all* the offences with minimum sentences as listed above.[34] The will of our elected representatives could not be more clear. Parliament has concluded these sentences are necessary to denounce and deter highly egregious and harmful criminal acts aimed at children and underage victims. It amounts to an important statement on behalf of the constitutionally elected officers of the people of Canada that the manipulation and degradation of child victims will not be

[34]As of the date of this writing, the bill has passed through all three readings in the House of Commons and has progressed to its third reading in the Senate, "*An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*" (November 2022), online: https://www.parl.ca/LegisInfo/en/bill/44-1/c-5

tolerated in our communities across Canada. Saskatchewan submits that this message from the Parliament of Canada should be afforded substantial deference in this debate.

37. Second, on April 2, 2020 this Court released its reasons in *R. v. Friesen.*[35] This is a landmark ruling that acknowledged and denounced the insidious nature of all crimes involving the sexual abuse and exploitation of children and underage victims. This Court stated that the protection of children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the *Criminal Code*[36]. Further, this Court stressed that courts *must* impose sentences that are commensurate with the gravity of sexual offences against children and that reflect the moral culpability of the offender's actions.

38. This Court provided guidance for sentencing in sexual interference cases but noted that the same sentencing principles apply to the closely related offences, most of which are included in the tables above. The offence of child luring was specifically mentioned.[37] That guidance is directly relevant to the question of whether a one-year mandatory sentence for conduct intended to facilitate the commission of those crimes is grossly disproportionate. It is worth repeating some of what this Court said on this issue:

> [50] To effectively respond to sexual violence against children, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. Getting the wrongfulness and harmfulness right is important. As Pepall J.A. recognized in *R. v. Stuckless,* 2019 ONCA 504, 146 O.R. (3d) 752 ("*Stuckless (2019)*"), failure to recognize or appreciate the interests that the legislative scheme of offences protects can result in unreasonable underestimations of the gravity of the offence (paras. 120, 122, 130, and 137; see also Marshall, at pp. 219-20). Similarly, it can result in stereotypical reasoning filtering into the sentencing process and the consequent misidentification and misapplication of aggravating and mitigating factors. … Properly understanding the harmfulness will help bring sentencing law into line with society's contemporary understand of

[35] *R. v. Friesen,* 2020 SCC 9, 391 CCC (3d) 309

[36] *Ibid,* at para. [42]

[37] *Ibid,* at para. [44]

> the nature and gravity of sexual violence against children and will ensure that past biases and myths do not filter into the sentencing process (*Stone,* at para. 239; *R. v. Barton,* 2019 SCC 33, at para. 200).[38]

39. The appellant's factum in *Marchand* makes it very clear from statistical studies and published academic articles that the internet is a place where vulnerable child victims are increasingly unwitting targets on the part of adult predators.[39] The Court in *R. v. Friesen* emphasized where the sentence focus must be in cases involving the actual or attempted sexual abuse of children or underaged victims:

> [56] This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that, as this Court held in *R. v. McCraw,* [1991] 3 SCR 72, "may often be more pervasive and permanent in its effect than any physical harm" (p. 81).
>
> …
>
> [74] It follows from this discussion that sentences must recognize and reflect both the harm that sexual offences against children cause and the wrongfulness of sexual violence. In particular, taking the harmfulness of these offences into account ensures that the sentence fully reflects the "life-altering consequences" that can and often do flow from the sexual violence (*Woodward,* at para. 76; see also, *Stuckless (2019),* at para. 56, per Huscroft J.A., and paras. 90 and 135, per Pepall J.A.). Courts should also weigh these harms in a manner that reflects society's deepening and evolving understanding of their severity (*Stuckless (2019),* at para. 112, per Pepall J.A.; *Goldfinch,* at para. 37).[40]

40. In summary, Saskatchewan submits a fulsome consideration of the first concern listed in *R. v. Morrison* with respect to the "suspect constitutionality" of s.172.1(1), inexorably leads to a conclusion that the variation spoke of does not support a finding that the mandatory minimum sentence violates s.12. To repeat, all of the secondary crimes are very grave offences in their own right and the use of the internet to facilitate their commission

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[38] *R. v. Friesen, supra* footnote 35, at para. [50]

[39] Appellant's factum in *Marchand* at paras. [54] to [56]

[40] *R. v. Friesen, supra* footnote 34 at paras. [56] and [74]

aggravates the moral culpability of anyone committing an internet luring offence. Considered from this perspective, Saskatchewan submits that the focus of the law is tight. This is not a "vast array of offences" but rather a focused approach to protect the interests of vulnerable child victims from sexual abuse or exploitation on the part of adult predators via the internet or social media.

(ii) The Higher Tier in s.172.1(2)(a) is not Grossly Disproportionate to the Lower Tier in s.172.1(2)(b) - The Hybrid Issue

41. The second concern expressed in *R. v. Morrison* related to the fact there are different mandatory minimum sentences for luring offences prosecuted by indictment than by summary conviction. The majority in *Marchand* stated the question to be answered is whether that difference is so significant that it makes the higher mandatory minimum for indictable offences "grossly" disproportionate.[41]

42. On June 18, 2015, the mandatory minimum for internet luring prosecuted by summary conviction was increased from 90 days to 6 months.[42] Therefore, the difference between the two mandatory minimums is only 6 months. At the material time of the charges in *Morrison,* the gulf between the mandatory minimum of one year and 90 days was considerable. However, by the time of the *Morrison* ruling, the discussion had focused on the disparity between the 6 months and the one year mandatory minimums.[43] Acknowledging that we cannot rely on prosecutorial discretion to ensure fairness in charging and in prosecuting, Saskatchewan submits that this gulf does not result in circumstances where the application of the higher mandatory minimum is harsher than necessary. Yes, a sentence of one year may be harsh. It may even be severe. But the ultimate question for this Court is whether or not it is so cruel and unusual that it will offend the morals of our society.[44] Saskatchewan submits it would not, in fact there is a good

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[41] *R. v. Morrison, supra* footnote 6 at para. [152]

[42] *An Act Respecting the Strengthening of Penalties for Child Predators*, S.C. 2015, c. 23, s.11

[43] *R. v. Morrison, supra* footnote 6 at paras. [149] to [152]

[44] *R. v. Lloyd, supra* footnote 5 at para. [24]

possibility that the morals of our society would be offended if either the six month or the one year mandatory minimum were to be struck down as unconstitutional.

43. Saskatchewan makes the same argument with respect to the six month mandatory minimum at issue in *H.V.* for the summary offence in s. 171.1(2)(a). The argument takes on particular bearing in *H.V.* given that the Québec Court of Appeal did not intervene to vary the four month sentence deemed appropriate by the summary conviction appeal court judge. The Court of Appeal agreed with the lower court's analysis and found that the four month sentence was not grossly disproportionate to the six month mandatory sentence such that the difference was not sufficient to establish the high s. 12 threshold.[45] The court's conclusion in *H.V.* on the appropriate sentence demonstrates that the six month mandatory minimum is not so abhorrent or so intolerable that it outrages standards of community decency, and also that it is well within the range of appropriate fit sentences for similar offenders who commit similar offences.[46]

44. It is crucial to acknowledge that for any crime other than murder, there is no such thing as one, and only one, "fit sentence". Appellate courts appreciate there will almost always be a *range* of fit sentences appropriate for a specific offender who commits a specific offence. Appellate courts also recognize the broad discretion on the part of trial judges when it comes to identifying the sentencing objectives and principles that require emphasis on a case by case basis.[47] For that reason, differences of only six months in sentences for internet luring offences do not come close to proving these sentences are likely to be cruel, unusual and grossly disproportionate.

45. Saskatchewan notes the very words of this Court in *R. v. Morrison* suggest the mandatory minimum of one year in s.171.1 does not offend s.12:

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[45]*R. v. H.V., supra* footnote 2 at paras. [40] and [41]

[46]*See* also *R. v. P. (M.G.),* 2015 SKPC 80 at para [25], 123 W.C.B. (2d) 93 where the Court found that a period of incarceration beyond that of the then 90 day mandatory minimum was necessary.

[47]*R. v. Lacasse,* 2015 SCC 64, at paras. [39] to [41], [2015] 3 SCR 1084

> [153] … Child luring is a serious offence that targets one of the most vulnerable groups within Canadian society — our children. It requires a high level of *mens rea* and involves a high degree of moral blameworthiness. And while the offence may be committed in various ways and in a broad array of circumstances — which is generally the case with most criminal offences — the simple fact remains that in order to secure a conviction, the Crown must prove beyond a reasonable doubt that the accused intentionally communicated with a person who is, or who the accused believed to be, underage, with specific intent to facilitate the commission of a sexual offence or the offence of abduction against that person. Thus, it is at least arguable that a mandatory minimum sentence of one year's imprisonment is not grossly disproportionate in its reasonably foreseeable applications.[48]

46. In conclusion, Saskatchewan submits that neither the six month nor the one year mandatory minimum sentences for offences pursuant to sections 172.1(2)(a) and (b) are "so excessive as to outrage standards of decency" or "abhorrent or intolerable" to society. *R. v. Morrison* made it clear that this offence requires a very high level of *mens rea* and involves a high degree of moral blameworthiness. This is a crime that is very hard to detect by the police. Once detected, the Crown must prove that the accused person *intentionally* communicated with an underage victim with the specific intent to facilitate any of the secondary designated offences. Most of the mandatory minimum challenges that have been successful in lower courts have come from pleas of guilt. This is a notoriously difficult section of the *Criminal Code* for the Crown to prove because of the knowledge aspect of the *mens rea* test as laid out in *R. v. Morrison.* Saskatchewan concludes that the mandatory minimums are not grossly disproportionate and, as directed by Parliament and the people of Canada, should be given great deference.

PART IV

REQUEST FOR ORAL ARGUMENT

47. Saskatchewan requests permission to present oral submissions at the hearing of both appeals.

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[48] *R. v. Morrison, supra* footnote 6, at para. [153]

ALL OF WHICH is respectfully submitted.

DATED at the City of Regina, in the Province of Saskatchewan, on the 11th day of November, 2022.

Grace Hession David

AGENT of the Attorney General for the
Province of Saskatchewan

PART VII

TABLE OF AUTHORITIES

STATUTORY PROVISIONS	**PARAGRAPH(S)**
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 198, c. 11 *Charte canadienne des droits et libertés*, Partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11	02, 04, 05, 06, 07, 34
Criminal Code, RSC 1985, c. C-46 *Code criminel*, LRC 1985, ch. C-46	01, 04, 22, 25, 36, 37, 38, 46
Bill C-5, *An Act to Amend the Criminal Code*, 44th Parliament, 1st Session, 3rd Reading	36
An Act Respecting the Strengthening of Penalties for Child Predators, S.C. 2015, c. 23	42