

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM QUEBEC)

**His Majesty the King
APPLICANT**

AND:

**Maxime Bertrand Marchand
RESPONDENT**

Intervener's Factum: Barbra Schlifer Commemorative Clinic

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PART I - OVERVIEW

1. In *R. c. Bertrand Marchand*, the 22-year-old accused met the 13-year-old victim at a rodeo, and subsequently contacted her through Facebook. From the start of their exchanges, the victim informed the accused that she was 13 years old. The accused, Mr. Marchand, attempted to lure the victim at least 18 times through social media.
2. Over a two-year period, Mr. Marchand arranged to meet up with the complainant on four occasions, and on each, the complainant willingly participated. The sexual relations were non-consensual, as the young person was under the age of legal consent. To obtain sexual favours, the accused encouraged her to break the foster placement rules, and abused the victim's naivety.
3. The accused pleaded guilty to the offences of touching a child under the age of 16, and luring a person under the age of 16. At his sentencing hearing, the accused argued the unconstitutionality of the mandatory minimum sentence for sexual interference in sections 151(a) and luring in 172.1(2)(a) of the Criminal Code (Cr. C.). This appeal raises concerns about the sentencing of those convicted under s.172.1(1) of the *Criminal Code*¹, which outlines the offence of child luring.
4. Child luring legislation has seen significant Parliamentary attention and change since its inception. The legislation was enacted in 2002 and was, in part, in response to the decision in *Sharpe*². Heightened social concern post-*Sharpe* over the dangers of technology for Canadian youth contributed to the introduction of the offence of luring a child and to raising the age of consent.³

¹ *Criminal Code* (R.S.C., 1985, c. C-46)

² *R v Sharpe* 2001 SCC 2

³ L. Menzie and T. Hepburn. Harm in the Digital Age: Critiquing the Construction of Victims, Harm, and Evidence in Proactive Child Luring Investigations. 43 Man. L.J. 391. 2020.

5. The Clinic supports Parliament's choice to prioritize denunciation and deterrence for sexual offences against children and youth victims, as a reasoned response to the wrongfulness of these offences, and the serious harm they cause, especially to young women. Parliament created the offence of child luring to combat the very real threat posed by adult predators who attempt to groom or lure children and youth victims by electronic means.

PART II - QUESTIONS IN ISSUE

6. The Barbra Schlifer Clinic will address two issues raised in this case:
 - a. It is necessary to apply an intersectional, gender-based violence analysis in sentencing cases that involve child sexual offences, including child luring. Sexual offences, including those against children, especially young girls, are gender-based violence that reflect, and reinforce, gender inequality.
 - b. A nuanced and flexible analysis of the electronic mechanisms, and mediums, used to lure young girls is necessary to stay current with rapidly changing uses of social media, in order to ensure that a complete understanding of the impact of child luring on women and girls is reflected at sentencing.

PART III – ARGUMENTS

i. Necessity of Gender-Based Violence and Intersectional Analysis in sentencing

7. Gender-based violence encompasses any act of violence perpetrated against an individual because of their sex, gender identity, sexual preference, or because of

perceived adherence to socially defined norms of masculinity or femininity. It is rooted in gender inequality, abuse of power and harmful norms.⁴

8. In sheer numbers, women and girls remain the primary targets of gender-based violence. Girls are the victims in approximately eighty percent of these reported cases, with a sharp rise in young survivors between the ages of thirteen and fifteen.⁵ Girls under the age of sixteen are four times more likely than boys to be victims of sexual abuse, and offenders are overwhelmingly male for youth victims.⁶
9. Adolescence is a time of heightened vulnerability for young girls, who are beginning to assert their independence, and trying to develop a healthy sexuality in a culture that continues to eroticize young women in ways that intersect with race, class and other factors.⁷
10. Despite this reality, there continues to be problematic judicial reasoning based on myths and stereotypes about child sexual abuse, including child luring, and these find their way into the sentencing process. This has led to some aggravating factors being ignored, or downplayed, while others are improperly seen by triers of fact as mitigating.⁸
11. In child sexual offences cases, including in child luring, there is a propensity for triers of fact to acknowledge the abhorrence of child luring, and the harm, and damage, this causes young victims.⁹ Beyond this acknowledgement, courts are reticent to label this predatory behaviour as a form of gender-based violence, and apply the appropriate

⁴ CoWater International Article. Approaches to addressing gender-based violence: Lessons from the field. May 29, 2019. https://www.cowater.com/en/approaches-to-addressing-gender-based-violence-lessons-from-the-field/#_ftn2

⁵ Suzie Dunn. Technology-facilitated Gender-based Violence an Overview. Centre for International Governance Innovation. 2020.

⁶ Statistics Canada, *Police-Reported Sexual Offences Against Children and Youth in Canada* (2012).

⁷ Janine Benedet. Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences. 44 *Queen's L.J.* 284. 2019. [J. Benedet 2019] at page 10.

⁸ *Ibid.*

⁹ *R v Morrison* 2019 SCC 15, *R v Levigne* 2010 SCC 25, *R v Legare* 2009 SCC 56, *R v Pengelley* 2010 ONSC 5488

analysis. Courts have relied on the behaviour of the victim, and the subjective circumstances of the offender and victim dynamic, to shift focus away from the offender's predatory, grooming behaviour. This reasoning minimizes the actual harm caused to the victim, and minimizes the moral blameworthiness of the offender.¹⁰ This inevitably impacts the sentencing process and the sentence being applied. This inconsistency fails to properly protect vulnerable youth, and ignores Parliament's intent behind the introduction of the offence of child luring.¹¹

12. To properly understand and sanction the criminal offence of child luring, it is imperative to apply a gender-based violence analysis. This also requires considering other intersectional factors, which centre a victim's experience of gender-based violence, including but not limited to, race, sexual orientation, gender identity, class, disability, religion, and immigration status.¹² Intersectionality helps us understand the patterns of sexual violence even more clearly. It illuminates the reality of survivors who live at the intersections of multiple marginalized identities—like Indigenous women, women living with disabilities, or trans people of colour—who experience sexual violence at higher rates.¹³ For example, women living with disabilities experience two times the amount of violence as women living without disabilities. Women living with disabilities who

¹⁰ Janine Benedet. "Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences." 44 *Queen's L.J.* 284. 2019. [J. Benedet 2019] at page 10.

¹¹ Isabel Grant, Janine Benedet, Danardo S. Jones. "Unreasonable steps: Trying To Make Sense of *R v Morrison*." 67 *C.L.Q.* 14. 2019.

¹² Kimberle Crenshaw. "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Colour." 43 *Stan. L. Rev.* 1241 (1990-1991).

¹³ VAW Learning Network "Women with disabilities and D/deaf women, housing, and violence." Issue 27, 2019 http://www.vawlearningnetwork.ca/our-work/issuebased_newsletters/issue-27/index.html

identify as lesbian, gay or bisexual, experience two times the amount of violence as women living with disabilities who identify as straight.¹⁴

13. In the case at bar, there are several factors present, which, had they been considered through a gender-based violence lens, could have placed more emphasis on the moral blameworthiness of the offender in this matter. The victim in this case was a child in the care of the Director of Youth Protection. The trial judge noted and acknowledged these circumstances of the victim, which made her more vulnerable to Mr. Marchand's advances. The majority of the Court of Appeal also noted and acknowledged these circumstances. Both Courts were cognizant of her very young age, and the nine-year age difference between the victim and the offender¹⁵, her status with the Director of Youth Protection,¹⁶ noting that the offender clearly took advantage of the victim's naivety,¹⁷ that the victim made her feelings of being used and exploited known to the offender¹⁸, and that this type of relationship was based on manipulation to satisfy sexual needs with a still developing adolescent¹⁹. The Courts also noted that the actions of the offender would "undoubtedly leave scars"²⁰ on the victim.
14. Even after noting all of this, neither court engaged in an intersectional, gender-based violence analysis regarding the offender's actions. Failure to fully engage an intersectional, gender-based analysis results in the further reinforcement of systemic

¹⁴ RAINN "For many Black survivors, reporting raises complicated issues." (June 19, 2020) <https://www.rainn.org/news/many-black-survivors-reporting-raises-complicated-issues> Tillman, S., Bryant-Davis, T., Smith, K., & Marks, A. (2010). "Shattering silence: Exploring barriers to disclosure for African American sexual assault survivors." 11 *Trauma, Violence, & Abuse*, Vol 2, 59-70. <https://doi.org/10.1177/1524838010363717>

¹⁵ *R. v. Bertrand Marchand* [2021] Q.J. No. 9996 at para 17. [Bertrand Appeal Decision]

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *R. v. Bertrand Marchand* [2021] Q.J. No. 9996 at para 31

¹⁹ *R. v. Bertrand Marchand* [2021] Q.J. No. 9996 at para 30

²⁰ *R. v. Bertrand Marchand* [2021] Q.J. No. 9996 at para 31

gender stereotypes and inequality.²¹ The result normalizes harmful stereotypes of manipulated young girls and women as “autonomous, willing, even enthusiastic participants in a sexual exchange.”²² The absence of an intersectional and gender-based violence approach reinforces a relationship that is both exploitative and unequal.

15. In the Clinic's experience working with survivors of gender-based violence, when abuse, especially sexual abuse, starts as a child, it leaves an indelible mark on the survivor, resulting in lasting trauma. Conversations amounting to luring can cause serious psychological and developmental harm to young victims, even without actual in-person sexual contact.²³

16. Many survivors carry this trauma with them throughout their adulthood, and it can impact every aspect of their life. Adverse impacts of sexual abuse at a young age hinder normal social growth, and can be a cause of many different psychosocial problems. Childhood sexual abuse has been correlated with higher levels of depression, guilt, shame, self-blame, eating disorders, somatic concerns, anxiety, dissociative patterns, repression, denial, sexual problems, and relationship problems.²⁴

17. It is imperative when determining the appropriate sentence in cases involving child sexual offences, including child luring, that judges apply an intersectional, gender-based violence analysis to the sentencing process. This will ensure that the vulnerability of the

²¹ Suzie Dunn. “Technology-facilitated Gender-based Violence an Overview. Centre for International Governance Innovation.” 2020 at page 9.

²² L. Menzie and T. Hepburn. “Harm in the Digital Age: Critiquing the Construction of Victims, Harm, and Evidence in Proactive Child Luring Investigations.” 43 *Man. L.J.* 391. 2020.

²³ Isabel Grant, Janine Benedet, Danardo S. Jones. “Unreasonable steps: Trying To Make Sense of *R v Morrison*.” 67 *C.L.Q.* 14. 2019.

²⁴ W. Maltz “Treating the Sexual Intimacy Concerns of Sexual Abuse Survivors” 17 *Sexual and Relationship Therapy* 4. 2002 321 – 347.

victim, and the harm caused to them, are not overlooked when determining the appropriate sentence in these cases.

ii. An Intersectional, Gender-Based Approach to s. 172.1 of the Criminal Code

18. Child luring was added to the *Criminal Code*²⁵ in 2002 to protect potential child victims.

Indeed, this intent was noted in *R v Alicandro*²⁶, wherein the Court of Appeal for Ontario stated that,

“The language of s.172.1 leaves no doubt that it was enacted to protect children against the very specific danger posed by certain kinds of communications via computer systems. The internet is a medium in which adults can engage in anonymous, low visibility and repeated contact with potentially vulnerable children. The internet can be a fertile breeding ground for the grooming and preparation associated with the sexual exploitation of children by adults. One author has described the danger in these terms:

For those inclined to use computers as a tool for the achievement of criminal ends, the Internet provides a vast, rapid and inexpensive way to commit, attempt to commit, counsel or facilitate the commission of unlawful acts. The Internet's one-too-many broadcast capability allows offenders to cast their nets widely. It also allows these nets to be cast anonymously or through misrepresentation as to the communicator's true identity. Too often, these nets ensnare, as they're designed to, the most vulnerable members of our community.”²⁷

19. The *Criminal Code* only speaks to the use of telecommunication and the internet to commit specific sexual offences against children. Children now primarily use the internet to communicate, and it is these communications that are the underpinnings of s. 172(1) of the *Code*. The factual scenarios that were first contemplated by s. 172(1)

²⁵ *Criminal Code* (R.S.C., 1985, c. C-46) s.172.1(1)

²⁶ *R v Alicandro*, 2009 ONCA 133.

²⁷ *R v Alicandro* 95 O.R. (3d) 173; Gregory J. Fitch, Q.C., "Child Luring" (Paper presented to the National Criminal Law Program: Substantive Criminal Law, Advocacy and the Administration of Justice, Edmonton, Alberta, July 10, 2007), Federation of Law Societies of Canada, 2007, at s. 10.1, pp. 1 and 3

involved an adult, typically using the guise of anonymity, accessing space on the internet, like a chat room— where children were most likely to frequent.

20. The Schlifer Clinic advocates for a legal analysis that includes the consideration of gender-based violence, and how the internet is used as a means to harm victims with various intersecting identities including sex, gender identity, youth, race, disability among others. With this lens, even with the evolution of technological practices, the exploitative, predatory, and harmful effects that continue to impact women will be the focus on determining appropriate sentences.
21. As the means to communicate online rapidly change and evolve, an intersectional and gender-based violence lens should remain at the forefront of a Court's analysis when a fit sentence is being determined, to ensure that the experiences of survivors of sexual violence are not misunderstood or minimized. The essential elements of the luring offence are that an adult is taking advantage of a child's vulnerability for an adult's sexual benefit, using the available communication means to accomplish this offence.
22. The Quebec Court of Appeal upheld that this was "not a classic case of a predator assuming a fake identity or using trickery to find or lure victims who are minors over the Internet to facilitate the commission of sexual offences."²⁸ The Trial Court and Court of Appeal of Quebec also noted that "the means used by the offender to communicate with [the victim] reveal a generational choice rather than a means specifically chosen to anonymously browse various websites searching for a young victim or to enter into contact with a young person for the purpose of eventually obtaining sexual favours."²⁹ This factual parsing undermines survivors' experiences as survivors of gender-based

²⁸ *R v Bertrand Marchand*, 2020 QCCQ 1135 at para 64; *R. v. Bertrand Marchand*, 2021 QJ 9996 at para 32.

²⁹ *R. v. Bertrand Marchand*, 2021 QJ 9996 at para 64

violence. Distinguishing the facts of this case from other luring offences, based on how the Internet communications were used between the offender and victims, failed to take into consideration the overall and long-term impact of the gender-based violence on the young victim.

23. The potential for anonymity in online communications is simply one example of how technology can be used in a specific instance to perpetrate harm against a specific victim. Anonymity, or false identity, may form a relevant part of the gender-based violence analysis in a particular case but is not a necessary element in every situation of child luring. The wording of the offence in s. 172(1) does not address the issue of the offender's identity. The use of anonymity may be an aggravating factor at sentencing because it may be seen as a means to facilitate the harm, which is understood through an intersectional gender-based violence lens.
24. The lower courts found luring is less serious if it follows previous "consensual" sexual contact.³⁰ This Court has found there is no valid prior consent to sexual activity and consent is required for each sexual contact.³¹ Similarly, manipulative luring may be used to facilitate a new sexual contact even if contact between the victim and offender occurred in the past.³²
25. *R v Legare* confirms that the focus of the statute is the *intention* of the accused person at the time that the Internet is used as a medium to facilitate the communications.³³

[31] Accordingly, the content of the communication is not necessarily determinative: What matters is whether the evidence as a whole establishes beyond a reasonable doubt that the accused communicated by computer with an underage victim *for the purpose*

³⁰ *R. v. Bertrand Marchand*, 2021 QJ 9996 at para 70 and 87

³¹ *R. v J.A.*, 2011 SCC 28

³² *R. v. Bertrand Marchand*, 2020 QCCQ 1135 at para 70; *R. v. Bertrand Marchand*, 2021 QJ No 9996 at para 34.

³³ *R v Legare*, 2009 SCC 56 at para 29.

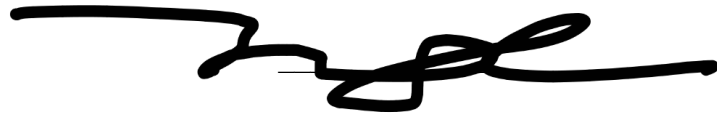
of facilitating the commission of a specified secondary offence in respect of that victim.

[36] To sum up, then, I reiterate that s. 172.1(1)(c) comprises three elements: (1) an intentional communication by computer; (2) with a person whom the accused knows or believes to be under 14 years of age; (3) for the specific purpose of facilitating the commission of a specified secondary offence — that is, abduction or one of the sexual offences mentioned in s. 172.1(1)(c) — with respect to the underage person.

Conclusion

26. Sexual assault complainants with an intersectional experience related to gender, age, immigration status, race, culture, and disability deserve intersectionality, and gender-based violence to be part of the contextual analysis of sentencing offenders convicted of s. 172.1(1) the *Criminal Code*. The timing, medium, and anonymity of the communications are only factors that contribute to understanding the nature and extent of the sexual violence and its impacts on the survivor.
27. The Courts should depart from a formulaic and limited definition of luring, and must adapt to current trends in the information age, where internet usage has seen a rapid shift in the last few years, especially during the pandemic. The internet, while an extraordinary tool, comes with a high risk for survivors, as it continues to change and evolve, and be used to exploit. Given the advancements in internet communications, and the widespread access to technology, Canadian survivors expect the justice system to understand sexual violence, risks, and its impacts in this digital age and respond accordingly.

All Of Which is Submitted to this Honourable Court



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PART IV – SUBMISSIONS ON COSTS

1. Barbra Schlifer Commemorative Clinic does not seek costs.

PART V – ORDER

2. Barbra Schlifer Commemorative Clinic asks that no order be made against it.

PART VI – SUBMISSIONS ON PUBLICATION

N/A

PART VII – AUTHORITIES

Caselaw

R v Sharpe 2001 SCC 2.

R v Morrison 2019 SCC 15.

R v Levigne 2010 SCC 25.

R v Legare 2009 SCC 56.

R. v J.A., 2011 SCC 28.

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PART VII – STATUTES, REGULATIONS, ETC

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