File No. 37687

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

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
[Respondent on C61097
Appellant on C61110]

- and –

DOUGLAS MORRISON

RESPONDENT
[Appellant on C61097
Respondent on C61110]

- and-

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PART I – STATEMENT OF THE CASE

a) Overview and the Respondent's position

1. The Internet is ubiquitous—a mainstay of communication, commerce, social interaction and other facets of everyday life. Users value their privacy, even their anonymity. Informational privacy allows for legal, and unfortunately illegal, pursuits online. There are unique challenges to Internet crime, such as the lack of physical, in-person presence, which make crimes in cyberspace different than in the real world. These challenges impact the apprehension of offenders but also raise the risk of "inadvertently catching morally innocent conduct…".[1] Misrepresentation and deception are "rampant"[2] online. Personal identities and characteristics, such as age, are concealed or obfuscated; representations "notoriously unreliable."[3] In short, the source of the information—the Internet itself—is a notoriously unreliable medium, which exacerbates these challenges. There is a fine line between legal sexual interests that cut against mainstream sexual mores, such as fetish and fantasy role-plays, and predatory sexual activities against children. The difficulty in regulating Internet crime, even with the laudable objective of thwarting predators' access to children, is determining where to draw this line appropriately.

2. In prohibiting underage facilitation *via* telecommunication for certain enumerated sexual offences through s. 172.1, Parliament has effectively criminalized online grooming. No one disputes that s. 172.1 is a response to the exploitation of children by online predators; nor that this is a laudable objective. It is the balancing in s. 172.1 that is skewed—the balance between empowering the police to proactively regulate and enforce online sexual crimes, while at the same time, not infringing on online privacy and freedom to engage in lawful interests. The right to be presumed innocent of sexual wrongdoing except in accordance with the Crown's high burden of proof is imperative to strike the right balance. The challenge facing this Court is to determine whether the scheme enacted in s. 172.1 to "close the cyberspace door"[4] to predators, without

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1 *R v Hamilton*, [2005] 2 SCR 432 at ¶¶30 – 31.
2 *R v Pengelley*, 2010 ONSC 5488 at ¶17; *R v Ghotra*, 2016 ONSC 1324 at ¶123.
3 Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, at ¶60.
4 *R v Legare*, [2009] 3 SCR 551 at ¶25.

ensnaring innocent people engaged in legal, but fringe sexual behaviour (the "daddy/daughter role-play" scenario for instance) strikes the appropriate balance and is constitutional.

3. The Respondent submits that the mandatory presumption of age in s. 172.1(3) violates s. 11(d) of the *Charter* and the Court of Appeal for Ontario was correct to so find. Section 172.1(4)—the reasonable steps requirement—violates s. 7 of the *Charter* and in this regard, the court below erred. Neither section can be saved by s. 1. And, corollary to these issues, the Court of Appeal was correct to find that the one-size-fits-all mandatory minimum carceral sentence of one year is grossly disproportionate and violates s. 12 of the *Charter*. A detailed summary of the Respondent's position follows:

i. Despite the laudable objective, s. 172.1(3) is unconstitutional. As misinformation is rampant online and misrepresentations and duplicity are commonplace, a representation that an interlocutor is underage does not inexorably lead to the conclusion that the accused believed the representation. The medium itself is unreliable. This violates s. 11(d).

ii. The s. 11(d) violation cannot be saved by s. 1 of the *Charter*. This is the Appellant's burden and requires a high probability of proof. The Crown did not seek to justify any *Charter* breaches before the trial judge. The Court of Appeal for Ontario was correct to hold that the section fails the minimal impairment and overall proportionality branches of the *Oakes* test.

iii. The Court of Appeal for Ontario's interpretation of s. 172.1(4) violates s. 7 of the *Charter* by creating an offence that allows for conviction on the basis of a failure to take reasonable steps to ascertain age. This allows for conviction where there is no criminal act or on the basis of mere negligence, either of which violate the principles of fundamental justice.

iv. The Court of Appeal for Ontario was correct to conclude that the one-year mandatory minimum sentence violates s. 12 of the *Charter*.

b) The Respondent's statement of facts

4. The Respondent accepts the Appellant's summary of the facts and the proceedings below, subject to the following additions and clarifications.

5. The Respondent's ad caught Cst. Hutchinson's attention because it suggested that the poster sought to meet "a young girl." The post contained no limitations such as "18+" or "RP" (short for "role-play") or "legal age." Over email and through text messages, the Respondent twice asked her to send a picture. She never provided one. Towards the end of the conversations, the Respondent asked for Mia's phone number, which Hutchinson later provided. After the second request for a photograph on April 14, 2013, there were only a few emails and texts. The Respondent had no further communication with "Mia" after a missed call on April 26. On May 10, 2016, Hutchinson texted: "R U Mad at me?" The Respondent responded on May 21 with: "Who are you?"[5]

6. Cst. Hutchinson acknowledged that she had never investigated this type of ad before, but she believed underage girls could respond. Her interest was piqued because of the lack of qualifiers. A few keystrokes would have alleviated her "red flags." If she felt the ad was a "role-play", she "typically wouldn't respond to the ad" because it was "not going to bear any fruit." She agreed that on the Internet generally, and on *Craigslist* specifically, people looked for sexual role-plays. The "daddy/daughter" role-play was a "very common phenomenon on the Internet…". She had seen it "quite often". The defence hired a private investigator who searched the Internet for the prevalence of this role-play. A two-volume, 34-tab exhibit book that contained numerous ads and articles relating to this role-play, from *Craigslist* and other websites, was filed before the trial judge. He accepted the defence had **"established that "Daddy's little girl" is a very popular…role-play…[on the Internet]…"**.[6]

7. The Respondent was 67 years old. He had no prior criminal record. He testified that he placed his ad on *Craigslist*, a website that he did not expect children to be on, in a section that required users to be over the age of 18 called "casual encounters." He used various chat sites for

5 Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, pp. 45 – 46.
6 Evidence of H. Hutchinson, Appellant's Record, Vol. II, p. 69/28 to p. 93/13.

both regular conversations and those about adult sex. He admitted that he had accessed pornographic websites, but not regularly. He never accessed child pornography. He ultimately got bored and decided to post the ad. The Respondent said his conversations with "Mia" were role-playing. It never crossed his mind that a person actually under 18 would respond. He anticipated a response from an adult woman for father-figure role-play. His picture requests were to gauge the look and age of the other person. When "Mia" responded, he immediately knew he was not talking to a 14-year-old girl. He admitted lying about his age—*i.e.* stating he was 45—and where he lived in his ad. When he told Cst. Hutchinson that he only talked "to one girl", the term "girl" was a generic reference to all females. The police conducted a search of his home. They found no child pornography or other evidence of child grooming.[7]

8. The trial judge was satisfied that the Respondent's denial, including the fact that he was involved in a long-term adult relationship, his stated intent to role-play and only engage adults with similar predilections, left him in reasonable doubt, noting:

> On the whole of the evidence, including the testimony of Mr. Morrison, **I am satisfied beyond a reasonable doubt that he was at least indifferent to the age of the person he was communicating with.** Indifference however is not the equivalent of belief.
>
> Nor, in my view, has the evidence satisfied me, at least to the standard of proof beyond a reasonable doubt, that Mr. Morrison was wilfully blind, as that term is understood in Canadian criminal law, to Mia's actual age. In other words, I am not satisfied that Mr. Morrison actually suspected that Mia was underage and chose not to ask her in order to insulate himself from perfecting his knowledge. Rather, I mean indifferent in the sense of simply not turning his mind to the question in any meaningful way. In my view, such a state of mind is closer to negligence rather than the sort of advertence necessary to sustain a finding of an actual belief in his part that Mia was underage.
>
> After carefully considering all of the evidence, I find that Mr. Morrison's evidence is sufficient, if barely so, to inspire a reasonable doubt concerning his subjective belief regarding the age of the person with whom he was communicating. [Emphasis added.][8]

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7 Evidence of D. Morrison, Appellant's Record, Vol. II, 165/16 to p. 189/22; p. 190/14 to p. 208/20; p. 239/5 to p. 241/28.

8 Reasons for Judgment on Conviction, Ontario Court of Justice, dated January 16, 2015, Appellant's Record, Vol. 1, p. 19, ¶¶26 – 28.

PART II – POINTS IN ISSUE

9. The Respondent's position is that the following issues are raised in this case:

I. IS S. 172.1(3) UNCONSTITUTIONAL BECAUSE IT OFFENDS S. 11(D) OF THE *CHARTER* AND CANNOT BE SAVED UNDER S. 1?

II. IS S. 172.1(4) UNCONSTITUTIONAL BECAUSE IT VIOLATES S. 7 OF THE *CHARTER*?

III. DOES THE MANDATORY MINIMUM SENTENCE OF ONE YEAR CONSTITUTE A GROSSLY DISPROPORTIONATE SENTENCE AND IS THEREBY UNCONSTITUTIONAL UNDER S. 12 OF THE *CHARTER*?

PART III – BRIEF OF ARGUMENT

I. IS S. 172.1(3) UNCONSTITUTIONAL BECAUSE IT OFFENDS S. 11(D) OF THE *CHARTER* AND CANNOT BE SAVED UNDER S. 1.

a) The statutory framework – s. 172.1

10. The Respondent was charged under s. 172.1(1)(b), which states:

> 172.1 LURING A CHILD — (1) Every person commits an offence who, by a means of telecommunication, communicates with
>
> …
>
> (b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152[9], subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person…
>
> (3) PRESUMPTION RE AGE — Evidence that the person referred to in paragraph (1) (a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.
>
> (4) NO DEFENCE — 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

9 The operative section for the facilitation in this case was invitation to sexual touching, which involves a person who invites, counsels or incites sexual touching of any person under the age of 16 years.

steps to ascertain the age of the person.

11. In the case at bar, like the majority of the reported cases, the Crown did not allege that the Respondent communicated with an underage child. This case involves proactive police enticement of Internet users that might want to communicate with minors for a prohibited purpose. The offence is that the Respondent communicated online with an undercover officer (the interlocutor) for the purpose of facilitating (grooming/luring) the commission of a sexual offence (invitation to sexual touching), with the belief the interlocutor was under 16 years old.

b) The presumption of innocence and legal presumptions

12. Section 11(d) of the *Charter* protects an accused's right "to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal...". In *Oakes,*[10] Dickson C.J.C. noted the importance of zealously protecting this fundamental principle:

> The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11 (d) of the *Charter*, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter* (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.[11]

Section 11(d) constitutionalizes the longstanding principle that no person be stigmatized as a criminal if their moral blameworthiness has not been proven by the state. It also restricts the situations in which Parliament can short-cut the Crown's burden of proof through statutory presumptions, however worded (*i.e.* some presumptions are "reverse onus" provisions, where the

10 *R. v. Oakes*, [1986] 1 SCR 103.
11 *Oakes*, *supra* at ¶29.

burden is on the accused to disprove a presumed fact, others, like the case at bar, are "basic fact presumptions", that can be rebutted).[12]

13. A mandatory presumption is unconstitutional where it allows for a conviction notwithstanding a reasonable doubt about the accused's guilt. The burden then falls to the Crown to justify the violation under s. 1 of the *Charter*. The underlying concern is that an accused *may* be convicted—*i.e.* a possibility—where a reasonable doubt exists. The application of the presumption of innocence to mandatory presumptions contains a number of principles that are distilled from the jurisprudence from this Court:

(i) the presumption of innocence is violated whenever an accused is liable to be convicted despite the existence of a reasonable doubt;[13]

(ii) if through a statutory presumption, an accused is required to establish—*i.e.* prove or disprove—anything (an essential element of the offence or an excuse (such as a defence)), then it violates s. 11(d) unless the defence or excuse can only be raised where the offence has been proved beyond a reasonable doubt;[14]

(iii) even if there is a rational connection between the established fact and the fact to be presumed, this would be insufficient and needs to be justified under s. 1;[15]

(iv) legislation which substitutes proof of an essential element will not infringe s. 11(d) if proof of the substituted fact leads inexorably to the proof of the other, such that there would be no controversy;[16]

(v) if the statutory provision is really a permissive assumption that the trier of fact *may,* but *not must,* draw an inference of guilt, there will be no infringement of s. 11(d);[17] and,

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12 *Oakes*, *supra* at ¶¶17 – 20.
13 *R v Downey*, [1992] 2 SCR 10 at p. 21; *R v Vaillancourt*, [1987] 2 SCR 636 at ¶29; *R v Whyte*, [1988] 2 SCR 3 at ¶¶24 – 27; *R v St-Onge Lamoureux*, [2012] 3 SCR 187 at ¶24.
14 *Oakes*, *supra* at ¶121; *Dubois v The Queen*, 1985 2 SCR 350 at 357.
15 *Downey*, *supra* at p. 29.
16 *Downey*, *supra.*
17 *Downey*, *supra*.

(vi) even if a provision plays a minor role in an accused's conviction, it will nevertheless violate s. 11(d) if the burden of proof falls on the accused.[18]

14. Most recently, this Court affirmed that the specific characterization of the impact of the mandatory presumption, or reverse onus—as an essential element, a collateral factor, an excuse, or a defence—should not affect the s. 11(d) analysis. This Court noted in *St-Onge Lamoureux*:

> A statutory presumption violates the right to be presumed innocent if its effect is that an accused person can be convicted even though the trier of fact has a reasonable doubt (*R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at pp. 654-56; *Downey*, at p. 21). In *R. v. Whyte*, [1988] 2 S.C.R. 3, the Court stressed that the distinction between elements of the offence and other aspects of the charge is irrelevant to the analysis regarding the right to be presumed innocent. "If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused" (p. 18). What is important for the purpose of determining whether the right to be presumed innocent is violated is not whether the statutory presumption relates to an essential element of the offence, but whether it exempts the prosecution from establishing the guilt of the accused beyond a reasonable doubt before the accused must respond (*Oakes*, at p. 121; *R. v. Dubois*, [1985] 2 S.C.R. 350, at p. 357). Thus, like the presumption at issue in *Oakes*, the ones established in s. 258(1)(c) will violate the right to be presumed innocent if they can result in the conviction of an accused in spite of a reasonable doubt that the accused is in fact guilty. [Emphasis added.][19]

15. The consideration of statutory presumptions is not new to this Court. In *Oakes*, the Court addressed a section of the *Narcotics Control Act* that presumed that an accused who possessed narcotics (the proved fact) possessed them for the purposes of trafficking (the presumed fact), absent the accused establishing on a balance of probabilities otherwise (*i.e.* a reverse onus). The majority found that this scheme violated s. 11(d) as it created a mandatory, basic-fact presumption. The critical issue—in terms of a constitutional infringement—was whether the impugned presumption *required* or *permitted* a conviction despite the existence of a reasonable doubt.

16. Subsequent decisions have expanded on the *dicta* from *Oakes*. For instance, In *Whyte*, the Court examined a presumption in the *Code* that where a person occupied the driver's seat of a vehicle (the proved fact) they were deemed to have care or control of the vehicle (the presumed

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18 *Holmes v R*, [1988] 1 SCR 914; *Whyte, supra*; *R v Keegstra*, [1990] 3 SCR 697; *R v Chaulk*, [1990] 3 SCR 1303; *Downey, supra.*

19 *St-Onge Lamoureux, supra* at ¶24.

fact). This Court was unanimous in holding that this violated s. 11(d) and found that the inquiry should be on the final effect of a provision on the verdict. The finding that a person was in the seat ordinarily occupied by the driver did not inexorably mean that they were in control of the vehicle. The Court also noted that the characterization of an element as being essential, collateral, or a defence was immaterial.

17. Moreover, where a presumption exists absent "evidence to the contrary"—the language employed in s. 172.1(3)—the provision can still violate s. 11(d). In *Downey*, this Court dealt with a challenge to a statutory provision in the *Code* that created a rebuttable presumption that if an accused lived with or was habitually in the company of prostitutes (the proved fact) that an accused lived off the avails of prostitution (the presumed fact). Like the child luring offence, the statutory presumption in *Downey* could be rebutted through reliance upon "evidence to the contrary". This Court ruled the two facts were not inexorably linked. The Court of Appeal for Ontario reached a similar conclusion in *Boyle*, where a mandatory presumption was also rebuttable on "evidence to the contrary." In *Boyle*, the provision of the *Code* that dealt with possession of property obtained by crime contained a presumption that where an accused possessed a motor vehicle with a vehicle identification number (VIN) "wholly or partially removed or obliterated" (the proven fact), "in the absence of any evidence to the contrary" was proof that the motor vehicle "was obtained… knowing that it was obtained by the commission of an offence in Canada…" (the presumed fact). The Court held:

> A mandatory presumption and a "reverse onus" provision with respect to an essential element of an offence have in common that when the presumption arises and it is not displaced, the trier of fact is required to find that the presumed fact has been proved. The essential difference between the two is that in the case of a mandatory presumption (rebuttable presumption of law) the presumption is displaced by evidence which is not rejected and which raises a reasonable doubt as to the existence of the presumed fact. In the case of a "reverse onus" provision, the presumption is only displaced by proof to the contrary on a balance of probability.
>
> **In my view, it is their common feature, that is, the mandatory nature of the conclusion required to be drawn when they arise, which requires that they be treated alike for the purpose of determining their constitutional validity.** Their difference, that is, the amount

> of evidence required to displace the presumption, does not warrant different treatment for constitutional purposes. [Emphasis added.][20]

c) The mandatory presumption in s. 172.1(3)

18. Applying the legal principles articulated in *Oakes* and affirmed later in *Downey*, s. 172.1(3) creates a mandatory, rebuttable presumption. The Crown need only establish the *proven fact* that an accused has received a representation as to age, and it is presumed that he or she subjectively believed the representation to be true.[21] The trier of fact is *required* to accept that the accused's subjective belief is proven beyond a reasonable doubt, regardless of whether the trier of fact has a reasonable doubt about the accused's actual belief. The Crown could rely upon a *single email* or *text message* containing a representation as to age in order to prove the essential element of belief in age—affecting both the *actus reus* and *mens rea* of the offence.

19. The presumption in s. 172.1(3) applies uniquely because of the nature of this inchoate offence. As Fish J. held for a unanimous Court in *Legare*,[22] because s. 172.1 is a preparatory offence that criminalizes otherwise lawful conduct,[23] categorizing aspects of the offence as part of the criminal act or mental element is difficult, or even of questionable usefulness. Here age impacts both the belief, which is an integral aspect of both the criminal act and moral fault, as well as the underlying facilitated offence: invitation to sexual touching.[24]

20. Moreover, there is no precedent in the jurisprudence for a mandatory presumption that is

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20 *Boyle and The Queen*, [1983] OJ No 3031 (CA); *R v Ireco Canada II Inc.* (1988), 65 CR (3d) 160 (Ont CA).

21 Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, at ¶70; *R v Levigne*, [2010] 2 SCR 3 at ¶32.

22 *Legare, supra* at ¶38.

23 It is neither an offence to communicate by a computer to an underage person—even about sex—unless it is for the purpose of facilitating an enumerated offence; nor is it an offence to facilitate an underage person to commit a sexual offence if the accused does not use a computer, provided it falls short of being a party, such as by aiding.

24 Section 152 of the *Code* reads: "Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly…".

triggered by state action, as opposed to something done by the accused. Here the presumption applies—*i.e.* part of the criminal act and mental fault element are made out—by a representation made by a police officer, rather than any action by the accused.[25]

21. Finally, the presumption is all the more troubling because it is focussed upon the very gravamen of the offence: *i.e.* communication with an underage child. As noted by Doherty J.A. in *Alicandro*,[26] sexual communications over the Internet are "not in and of itself criminal, illegal or necessarily inappropriate." The illegality of the conduct captured by s. 172.1(1) arises only from the difference in ages, or believed difference in ages, of the parties, as imputed by operation of the presumption (in the case of sting operations).

d) Response to Appellant's alleged errors on whether there is a s. 11(d) violation

22. The Court of Appeal for Ontario concluded that the proved fact (the representation of age) was not inexorably linked to the presumed fact (that the accused believed the interlocutor was underage), regardless of whether there was no evidence to the contrary, because of the *notorious nature* of deception on the Internet—a fact that has been consistently accepted in the jurisprudence (perhaps even more so in chat rooms and other social media forums).[27] Pardu J.A. noted:

> …in my view, even if there is no evidence of the accused's reasonable steps, or that the accused does not believe that the interlocutor is underage, it still does not follow inexorably from proof that the interlocutor represented that he or she is underage that the accused believed the representation. This is the fact that must be inferred from the representation under s. 172.1(3) and the relevant element of the child luring offence. Even if the presumption of belief is triggered and there is no evidence to the contrary, the trier of fact could still be left with a reasonable doubt that the accused believes that the interlocutor is underage.
>
> The mere fact of a representation is no indication of its reliability or credibility and does not lead inexorably to the conclusion that the recipient believed it. Some representations are

25 *E.g.* the accused's possession of narcotics (*Oakes*); the accused's occupation of the front seat (*Whyte*); the accused living in the presence of prostitutes (*Downey*); the accused possessing a motor vehicle with its VIN obliterated (*Boyles*), *etc*.

26 *R v Alicandro*, 2009 ONCA 133 at ¶19.

27 *Pengelley*, *supra* at ¶17, where the Crown advanced this notorious proposition; *Ghotra*, *supra* at ¶123; *R v Devic*, unreported, January 30, 2018 (BCPC), *per* Sutherland J. at ¶32; Reasons for *Charter* Ruling on ss. 172.1(3) and (4), Appellant's Record, pp. 1 – 9 at ¶¶26 – 29.

> inherently doubtful, even in the absence of evidence to the contrary. Representations on the Internet are notoriously unreliable. As put by Dawson J. in *R. v. Pengelley*, [2010] O.J. No. 4174, 2010 ONSC 5488, 261 C.C.C. (3d) 93 (S.C.J.), at para. 17, "nothing may be as it appears on the internet where deception is rampant". There is simply no expectation that representations made during Internet conversations about sexual matters will be accurate or that a participant will be honest about his or her personal attributes, including age. Indeed, the expectation is quite the opposite, as true personal identities are often concealed in the course of online communication about sexual matters. In the present case, there is evidence that Morrison himself made a misrepresentation about his age on his Craigslist advertisement.
>
> Given the reality of misrepresentation over the Internet, a trier of fact could well be left with a reasonable doubt that the recipient of a representation as to age believed the representation, **even in the absence of evidence to the contrary.** Thus, 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. Although the representation may lead to a *rational* inference that the accused believed the interlocutor was underage, that is not the applicable legal test… Considered in light of the circumstances of online communication and their content, that inference is not inexorable. [Italics in original, other emphasis added.]

23. The Appellant takes issue with this conclusion. It claims that the Court of Appeal for Ontario did not consider the "context" which includes the fact that the communication was for the purpose of facilitating a sexual offence—which is broadly defined as meaning "helping to bring about and making easier or more probable"[28]—and that for the presumption to apply, there must be no evidence to the contrary. The Court of Appeal for Ontario, however, considered both of these alleged deficiencies and nonetheless concluded there was a s. 11(d) violation. There are four reasons why the Appellant's complaints must fail.

24. First, Pardu J.A.'s conclusion that the *proved fact* (age representation) is not inexorably linked to the *presumed fact* (belief of age) is correct. The pervasiveness of deception on the Internet—*i.e.* the source of the information—is itself reason to reject the assertion and to not conclude that every accused person would *necessarily* believe it to be true. For a valid presumption to comply with s. 11(d), it is not sufficient to conclude an accused may believe, should believe or even that it is an obvious, rational inference. All of these standards fall short. As Dickson C.J.C.

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28 *Legare, supra* at ¶28, examples include grooming, reducing inhibitions or exploiting curiosity, immaturity or precocious sexuality.

held in *Oakes*, even where a rational connection might exist between the proved fact and the presumed fact, this is not sufficient to render the presumption constitutional, he noted:

> A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.[29]

Picking up this theme in *Downey*, Justice Cory (for the majority) noted that the rational connection between the proved and presumed facts is better taken into account when analyzing the effect of the s. 11(d) violation under s. 1. For it to be inexorably linked every accused must believe it to be true in all circumstances. With the Internet being such an unreliable medium, belief in age cannot be presumed by the mere assertion of age.

25. Second, there are circumstances on the Internet where a person's failure to inquire about an age representation provides no insight into whether they believed they were communicating with a child. Take for example the "daddy/daughter" role-play.[30] The trial judge accepted this role-play was pervasive on the Internet and—involving consenting adults—it was legal. That being the case, an accused engaged in this type of sexual fetish would not assume that the interlocutor was underage, even in the face of a clear representation. Beyond the unreliability of social chatroom representations generally, people engaged in legal sexual role-play necessarily lie. Duplicity and fantasy is the very purpose. A person engaged in this type of lawful pursuit would have no reason to inquire about age—to break character—nor any reason to accept an age representation to be true.

26. Third, the fact that the representation occurs in a context where the Crown also has to prove the *communications were also for the purpose of facilitating an enumerated offence* does not assist the Appellant. It does not make the presumed fact more likely to be true, let alone "inexorable." Facilitation has nothing to do with belief in age. And, as already noted above, facilitation is defined

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29 *Oakes*, *supra* at ¶59.

30 There are other morally ambivalent sexual fetishes or role-plays that would fall in to this same basket, such as young schoolgirl, teacher/student, babysitter fetishes, *etc*.

broadly. It is at the most *intangible* end of the inchoate spectrum.[31] The secondary offence—invitation to sexual touching—is also only illegal on proof that the interlocutor is "under the age of 16 years." The presumed fact (belief in age) applies to *both* the facilitation and the secondary offence. Facilitating outside of cyberspace, short of establishing that the accused was a party to an offence, is not illegal.

27. Fourth, the fact that an accused can rebut the presumption by pointing to "evidence to the contrary" does not cure the constitutional violation. The Court of Appeal for Ontario expressly dealt with this issue.[32] The trier of fact is "required to find that the presumed fact has to be proved"[33], irrespective of whether he or she has a reasonable doubt about the accused's subjective belief. The critical issue is not Parliament's language, but its tangible effect in terms of establishing the accused's guilt. In the case of s. 172.1(3), the Crown is able to satisfy its burden by merely proving that an age representation was made to the accused over the Internet. The only way to defeat this presumption is through "evidence to the contrary", which based on Fish J.'s interpretation in *Levigne*, has to be read in conjunction with s. 172.1(4) and "must" involve evidence of reasonable steps.[34] While it is technically possible that "evidence to the contrary" arise from the Crown's case for an offence under s. 172.1, as a practical matter, the presumption requires the accused to furnish evidence. The trier of fact is not required to assess the interlocutor's credibility, or even the reliability of the representation, prior to operation of the mandatory presumption.

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31 **Facilitation** (helping to bring about); **conspiracy** (agreement to commit); **attempt** (acts that go beyond mere preparation).

32 Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, at ¶¶58 – 59.

33 *Boyle*, *supra.*

34 *Levigne*, *supra* at ¶32, although the Respondent will argue that when Fish J.'s interpreted the reasonable steps as a *requirement* to displace the presumption (*i.e.* "evidence to the contrary") he was not considering the constitutionality of the provision, Fish J. noted that evidence to the contrary "*must* include evidence that the accused took steps to ascertain the real age of the interlocutor." [Emphasis added.]

e) Section 172.1(3) cannot be saved by s. 1

i) Overview

28. The constitutionality of s. 172.1(3) cannot be saved by s. 1 of the *Charter*. Two of the three-prongs of the *Oakes* proportionality test cannot be met: (i) the presumption of innocence is not impaired as little as possible; and, (ii) the deleterious effects are not proportional to their salutary effects and the importance of the objective. The Respondent does not dispute that the provision serves a pressing and substantial objective and that it is rationally connected. However, the justification under s. 1 is the Crown's burden and the Court requires a "very high degree of probability" that the infringement is proportionate to Parliament's aim, which results in it failing the proportionality test.[35]

29. The Crown's s. 1 justification amounts to a claim of *convenience* and *prosecutorial expediency*, and in so doing, sacrifices a hallowed and fundamental right. As Pardu J.A. noted below:

> The presumption of innocence protected by s. 11(d) of the *Charter* is, after all, "a hallowed principle lying at the very heart of criminal law" that "confirms our faith in humankind" and "reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise": *Oakes*, at pp. 119-120.[36]

The Crown has already been provided the necessary tools to combat the problems with anonymity on the Internet—the corollary concern with proving Internet crime—and the difficulty of prosecuting Internet trolling of children, by the inchoate nature of this offence and that it is grounded in belief. Neither of those aspects are disturbed if the presumption is declared unconstitutional. Moreover, the Appellant has not shown why this presumption assists in carrying out Parliament's goal. The absence of evidence in this area negatively impacts the Court's ability to determine if the extent of impairment is minimal.

ii) Contextual considerations

30. Four contextual points are important to the overall s. 1 analysis. First, the belief in interlocutor's age cuts across both the criminal act and mental intent and, together with the

35 *Oakes*, *supra* at ¶68.
36 Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, at ¶74.

incipient nature of the offence, is more intrusive on the presumption of innocence than in other cases where this Court has upheld a s. 11(d) violation under s. 1. In that regard, resort to case comparison is of little utility.[37]

31. Second, the presumption does not undermine key aspects of what the law was implemented to combat: the police ability to engage in proactive sting operations to *detect* online child predators and the ability to prosecute predators for their *belief* that they are conversing with an underage child. The section already provides the Crown with a mandatory limitation on any defence of mistake of fact under s. 172.1(4)—the requirement to take reasonable steps—a further restriction on the accused's ability to defend themselves from liability.

32. Third, because this is a criminal offence, one with high stigma and significant punishment, the presumption of innocence must be jealously guarded. The risk of wrongful conviction, particularly in light of the fact that there are morally ambivalent—but legal—sexual role-plays on the Internet, is a legitimate concern. As Fish J. noted in *Levigne*, s. 172.1 was enacted "to identify and apprehend predatory adults who, generally for illicit sexual purposes troll the Internet to attract and entice vulnerable children and adolescents".[38] Fish J. went on to describe the operation as "a barbed weapon" that permits the police, posing as children, to "cast their lines in Internet chat rooms, where lurking predators can be expected to take the bait." Put another way, removing the presumption does not dull the hook nor limit the ability of the police to cast. It only restores the netted person's ability to defend themselves under the ordinary burden of proof applicable to the vast majority of *Criminal Code* offences. This is necessary when the police cast in ambivalent areas, like fantasy role-play chat rooms.

33. Fourth, while Parliament is entitled to deference in the means they choose to prohibit morally reprehensible conduct, this is not without limits. The Court still has a vital role to play in applying judicial oversight to the *means* chosen and "care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of [its]

37 *Whyte, supra; Downey, supra.*
38 *Levigne, supra* at ¶24.

burden…" under s. 1.[39] In *Sauvé v Canada (Chief Electoral Officer)* this Court noted that in some cases "it is enough that the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has"; what is required is "rational, reasoned defensibility".[40] However, this Court has also cautioned against "substituting deference for the reasoned demonstration required by s. 1."[41] Moreover, deference is more applicable to Parliament's objective and whether it is pressing and substantial, as opposed to the proportional effect of the law.[42]

iii) Minimal impairment

34. This branch asks the question of whether the provision impairs the constitutionally protected right as little as possible. It requires the Court to determine whether alternative means of achieving the objective were available to Parliament. The Appellant's disagreement with the Court of Appeal for Ontario's s. 1 analysis is two-fold: i) that the court imposed a burden for the Crown to prove "unjustified acquittals" and ii) not addressing, or citing, the s. 1 jurisprudence on similar mandatory rebuttable presumptions.

35. On the first point, the Court of Appeal for Ontario did not suggest that to meet their s. 1 burden the Crown would have to show a problem with *improper acquittals*. Pardu J.A.'s comments must be read in context. They illustrate that the Crown had not pointed to any evidence—or common sense inference—that the objectives of s. 172.1 are served by a mandatory presumption. Nothing has been pointed to in the parliamentary records to support the purpose or need for a mandatory presumption. In fact, as the Court of Appeal for Ontario correctly pointed out, the child luring offence is potentially *easier to prove* than many *Code* offences because by the nature of the offence itself—by means of "telecommunication"—a digital record will invariably be created

39 *RJR-MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311 at ¶136.
40 *RJR-MacDonald, supra* at ¶127
41 *Sauvé v Canada (Chief Electoral Officer),* [2002] 3 SCR 519 at ¶18; *RJR-MacDonald, supra* at ¶¶127 and 154.
42 *Oakes*, *supra* at ¶¶141 – 142.

through emails and/or text messages.[43] In these circumstances, a legislative provision that derogates a basic and fundamental common law and constitutional principle, like the presumption of innocence, when there is no evidence of a problem, is not minimally impairing. It serves no purpose but still attenuates the presumption of innocence.

36. That said, the fact that the Crown did not try to justify a *Charter* breach under s. 1 nor lead any evidence in this regard, is relevant to whether the Crown can meet their burden. Before the trial judge, the Crown elected not to advance a s. 1 argument or call any evidence, noting "I'm not advocating a s. 1 response." When the defence expressed some concern about whether this concession was in relation to both ss. 7 and 11(d), the Crown noted that because the violations are related, he elected not to advance a s. 1 justification.[44]

37. The second point, that the Court of Appeal for Ontario failed to grapple with the relevant jurisprudence, also does not assist the Appellant, because of the unique nature of this offence. Minimal impairment does not rise or fall on whether Parliament employs a reverse onus or an evidential burden. The impact of the presumption on the essential elements of the offence is equally or of more significance.[45] As already stated above, s. 172.1 is unique in three respects: *first*, the belief relates to both the criminal act and mental intent. Put simply, the presumed fact makes out integral aspects of an accused culpability on multiple levels to establish this offence. *Second*, this is the only case where state action (*i.e.* making the representation) as opposed to something done

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43 Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, at ¶72.

44 Respondent's Record, Excerpt Crown Submissions from the Transcript of Proceeding, Colloquy, pp. 1 – 2.

45 The authorities relied upon by the Appellant each deal with uniquely situated presumptions. For instance, the accuracy of specialized equipment for analyzing blood alcohol content (*St-Onge Lamoureux*); elements of the *actus reus* (*Whyte*, sitting in the driver's seat equates with care and control, and *Downey*, living or accompanying prostitutes equates with living off their avails); the application of a defence or ulterior intent when the Crown has already proven the full offence (*Laba*, *Keegstra*, *Gosselin, Singh, etc.*). *Oakes* is somewhat comparable, albeit a reverse onus, because there the *intent* to traffic drugs was presumed based on the act of simple possession.

by the accused, triggers a presumption. *Third*, this offence is on the far end of the inchoate spectrum and the proof of belief in many cases will comprise the main or only contested essential element. It was neither necessary nor necessarily helpful for the Court of Appeal for Ontario to have embarked on a comparative analysis of prior jurisprudence.

iv) Overall proportionality

38. The last branch in the *Oakes* framework involves looking at overall proportionality. In this case, it involves a balancing of the *impact on the presumption of innocence* (the "deleterious impact") against *the benefits of having the presumption* (the "salutary effects").

39. The deleterious impact has to be measured in light of the right that Parliament seeks to abrogate. As Dickson C.J.C. noted in *Oakes*:

> Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [Emphasis added.][46]

Where a law is not minimally impairing, resort to the overall proportionality branch is rarely used, to the point where Professor Peter Hogg called it "actually redundant."[47] However, this Court rejected this proposition in *Alberta v Hutterian Brethren of Wilson Colony*, noting: "[t]he final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation."[48] Despite the conceptual difference, the vast majority of cases rise or fall on minimal impairment.

40. The presumption under s. 172.1(3) adds little benefit to the Crown in terms of its ability to prosecute the crime of Internet luring. Despite the Appellant's assertion that on a "common sense"

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46 *Oakes*, *supra* at pp. 139 – 140.
47 *Constitutional Law of Canada* (5th ed. Supp.), Vol. 2, at §38.12, as referred to in *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 at ¶75.
48 *Alberta v Hutterian Brethren*, *supra* at ¶77.

or "logical" rationale that the presumption "plays a significant beneficial role…",[49] the salutary effects are unknown and difficult to quantify. The Court of Appeal for Ontario was correctly critical of the Crown for raising this issue for the first time on appeal and not leading any evidence. In fact, before the trial judge, the Crown *expressly elected* not to seek to justify a breach under s. 1.[50] There is nothing to suggest that prosecutorial difficulties arise in the absence of the presumption.[51] While difficult to establish, it nonetheless remains the Crown's burden to show a very high probability that the salutary benefits outweigh the impact on the constitutional right.

41. On the other hand, the deleterious impact is palpable. A mandatory presumption cuts against a fundamental and "hallowed principle" that has been described as the "golden thread" running through the criminal law: "it is the duty of the prosecution to prove the [accused's] guilt… no attempt to whittle it down can be entertained."[52]

42. Even if the ability to rebut the presumption is available, an accused should not be saddled with this burden unless there is a real and valid justification, such as difficulties with proof—as seen in *Whyte* and *Downey*. Take *Whyte* for instance, this Court noted:

> This history shows that there is a serious problem with the mental element of this offence, because the fact of intoxication itself raises doubts about the accused's mental state and

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49 Appellant's Factum at ¶59 – 60.

50 Respondent's Record, Excerpt Crown Submissions from the Transcript of Proceedings, Colloquy, pp. 1 – 2.

51 Beyond the limited discussions of the *purpose* of s. 172.1 to "safeguard children from criminals on the Internet and to ensure that children are protected from those who would prey upon their vulnerability…", in situations where offenders "use the anonymity of the Internet to lure children into situations were they can be exploited sexually…" (see House of Commons Debates, 37th Parliament, 1st Session (May 3, 2001) at 1620, *per* Hon. Anne McLellan), which has been accepted in the jurisprudence (*Legare, Levigne and Alicandro, supra*), there does not appear to be any comment on the efficacy or importance of the mandatory presumption—including nothing in the Appellant's factum nor anything referred to in the leading authorities from this Court or the provincial appellate courts.

52 *Oakes, supra* at ¶30, quoting with approval, *Woolmington v Director of Public Prosecution*s, [1935] AC 462 (HL), *per* Viscount Sankey at pp. 481 – 482.

> ability to form an intention. The presumption was created by Parliament in response to that history. On the one hand, it was repugnant to theories of criminal liability that a person could be convicted of an absolute liability crime, with no possibility of a defence based on the mental state of the accused. On the other hand, as the Minister of Justice commented, it is shocking to hear that an accused could be acquitted of an offence for which consumption of alcohol is a required element, because he was too intoxicated to be guilty. The presumption was added to resolve the problems caused by both of these alternatives. [Emphasis added.]

In *Whyte*, Parliament enacted a presumption to avoid an overt problem in proving a person was in care and control of a motor vehicle, in the absence of knowing how the accused came to be in the driver's seat, his purpose for being there and whether his intention was to assume care and control. The difficulties with proof in this area of the impaired driving law were routed historically, demonstrable and logical.

43. This is what the Court of Appeal for Ontario meant by there was no demonstrable "problem with unjustified acquittals". The problem identified in *Whyte* has no bearing on the facilitation offence. In s. 172.1 prosecutions, the record of the conversations will be preserved and placed before the trier of fact. There is no issue with context or ambiguity unless it naturally arises from the circumstances and context of the communication, which can be sufficient to rebut the presumption in any event. In this circumstance—the *only* one in which facilitation can occur—there is no need for a mandatory presumption, and the presumption of innocence is limited unnecessarily. As Pardu J.A. rightly found below: "I am not persuaded that the presumption actually facilitates the conviction of child luring offences by increasing the number of convictions that would ordinarily occur without resort to the presumption or that there is a problem with unjustified acquittals."[53] In other words, there was no demonstrated salutary benefit, yet the impact on the presumption of innocence was plain. The very purpose of the rebuttable presumption in s. 172.1(3) is to abrogate the presumption of innocence**.** The Respondent submits that this deleterious effect is not proportional.

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53 Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, at ¶73.

II. IS S. 172(4) UNCONSTITUTIONAL BECAUSE IT VIOLATES S. 7 OF THE *CHARTER*?[54]

a) Overview and the findings of the Court of Appeal for Ontario

44. With respect to s. 172.1(4), to the extent that it allows for conviction on the basis of a failure to take reasonable steps to ascertain age it violates s. 7 of the *Charter*. This allows for a criminal conviction where there is no criminal act or on the basis of mere negligence, either of which violate the principles of fundamental justice. The Court of Appeal for Ontario found that s. 172.1 created a negligence based *mens rea* offence. In explaining the operation of s. 172.1(4) the Court held that the reasonable steps to ascertain the age of the interlocutor injected an *objective element* into the fault standard. The Court rejected the Crown's argument that a conviction for Internet luring necessarily meant the *mens rea* was fully subjective because the facilitation component was subjective, noting that "a failure to take the steps expected of a reasonable person is by definition negligence."

45. In the context of a sting operation, the Court of Appeal for Ontario reasoned there are two paths to liability for Internet luring: (i) where the Crown proves subjective belief in an underage interlocutor beyond a reasonable doubt; or (ii) where the Crown proves the accused did not take reasonable steps to ascertain the age of the interlocutor. Specifically, the Court held:

> 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, conviction will follow.
> 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.** [Emphasis added.][55]

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54 The Respondent raises this issue by leave that was granted through a cross-application for leave to appeal.

55 Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, at ¶95.

46. The Court of Appeal for Ontario went on to hold that s. 172.1 did not require subjective *mens rea* to withstand constitutional scrutiny. While the stigma and moral blameworthiness of Internet luring is high, the Court found that it was not as high as murder (or similar offences) such that the offence required *purely subjective intent*. The Court analogized s. 172.1(4) with the reasonable steps requirement for sexual assault offences, s. 273.2(b) and considered the judgment of Morden A.C.J.O. in *Darrach*[56] and applied it to s. 172.1(4). In this regard, the Court reasoned that like s. 273.2(b), s. 172.1(4) had a sufficient subjective dimension to dilute what might otherwise be a purely objective standard. The Court applied the reasoning in *Darrach* to uphold the constitutionality of reasonable steps for Internet luring:

> No doubt, even if the reasonable steps requirement in s. 172.1(4) is analogous to that in s. 273.2(b), it still has an objective dimension. The fault element for child luring established by subsection (4) is not purely subjective, even if it is not purely objective. However, I am not persuaded that the stigma of being convicted of child luring constitutionally mandates a purely subjective standard of fault, akin to the stigma of murder. As in *Darrach*, it is difficult to contemplate that a person who continues a sexual conversation where there is reason to believe his or her interlocutor is under age is "morally innocent". The moral culpability associated with failing to take reasonable steps to ensure that one's online communications do not amount to sexual predation of children is proportionate to the degree of stigma attached to the child luring offence, particularly given that the catastrophic consequences for child victims of internet luring are widely accepted and acknowledged: …
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> For these reasons, I conclude that the reasonable steps requirement in s. 172.1(4) of the *Code* does not infringe s. 7 of the *Charter*. [Emphasis added.][57]

b) Section 172.1(4) violates s. 7 of the *Charter* by creating an offence that allows for conviction on the basis of a failure to take reasonable steps to ascertain age

i) Context

47. The incorporation of the requirement that an accused take reasonable steps into part of the elements of the offence under s. 172.1 of the *Code* is unique. The historical development of the concept of reasonable steps has been adjunct to the defence of mistake of fact. The requirement to take reasonable steps was a *statutory construct* designed to qualify the common law defence of mistake of fact, and remove or limit baseless ignorance claims. As an honest but mistaken belief

56 [1998] OJ No 397 (CA).
57 Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, at ¶¶92 – 102.

in a set of facts negates criminal culpability for an offence,[58] the reasonable steps requirement was incorporated into criminal law to temper the use of a mistake of fact defence. It requires objectively discernible reasonable steps to be taken for an accused to claim a subjective mistaken belief.[59]

ii) When conviction is based on the accused's "belief", the *actus reus* of the offence is not completed which offends s. 7 of the *Charter*

48. In the context of a sting operation, it is impossible for s. 172.1 to involve a mistake of fact. In *United States of America v Dynar*[60], this Court discussed the concepts of knowledge, truth and belief for criminal offences. *Dynar* involved the double criminality rule in extradition proceedings in relation to s. 24(1) of the *Code*. The question was whether s. 24(1) permitted an attempt for the two money-laundering provisions and whether an attempt to do the factually impossible was an offence in Canada. When the offence occurred, the two money-laundering provisions included the word "knowing" rather than "knowing or believing", as they currently do. The "believing" provision created a built-in attempt offence.

49. The Court defined the essential ingredients of an attempt as follows:

> In our view, s. 24(1) is clear: the crime of attempt consists of an intent to commit the *completed offence* together with some act more than merely preparatory taken in furtherance of the attempt. This proposition finds support in a long line of authority. [Emphasis added.][61]

The Court explained that "knowing" or knowledge requires both *truth* and *belief* of the attempted offence. Both are required to satisfy the elements of *actus reus* of a completed attempt. However, *truth* is the only attendant circumstance that completes the *actus reus*, and it "does not vary with the intention of the accused." When the Crown cannot prove *the truth* (the underlying offence could actually occur)—*i.e.* only *belief* exists—the law of attempt applies. In other words, an attempt envisions an incomplete *actus reus.*[62]

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58 *Pappajohn v The Queen*, 2 SCR 120.
59 *R v Hussein*, [2017] OJ No 2109 (SCJ) at ¶¶48-52; *R v Hess; R v Nguyen*, [1990] 2 SCR 906; *R v Darrach, supra.*
60 [1997] 2 SCR 462.
61 *Dynar, supra* at ¶50.
62 *Dynar, supra* at ¶69 – 73.

50. In a situation involving a real child there is no constitutional issue. Section 172.1 is a complete offence: *i.e.* the Crown establishes truth (the interlocutor is underage) and belief (the accused believed the interlocutor is underage). The presumption in s. 172.1(3) is not needed. In circumstances involving a real child, s. 172.1(4) serves its intended and historic purpose—to limit mistake of fact and remove baseless claims of ignorance. There is no constitutional issue in light of *Darrach* and *Hess & Nguyen*.[63]

51. However, applying the reasoning in *Dynar* to s. 172.1 where the offence involves a sting operation, the attendant circumstance of an actual underage interlocutor is never proven, which raises the s. 7 concern. In such a scenario, the Crown does not have to prove the interlocutor's age and the accused could never carry out actual facilitation in relation to the enumerated sexual offence—it is only the belief and intent that are in issue. The requirement to take reasonable steps in s. 172.1(4) does not easily attach where the truth of the attendant circumstance (that the interlocutor is underage) has not been proven. For a belief offence, an accused who claims that he or she believed the interlocutor was of legal age cannot be said to have made a 'mistake of fact'. Reasonable steps therefore no longer operate in the traditional way. The accused is correct because the Crown has not established the truth of attendant circumstance. The criminal law has not previously required <u>correct innocent beliefs</u> to be tempered with reasonable steps. This infringes s. 7 because an accused can be convicted for failing to take reasonable steps without the Crown proving a completed criminal act.[64]

iii. <u>Section 172.1(4) allows for conviction based on *mere negligence* which offends s. 7 of the *Charter*</u>

52. Despite the statutory language that s. 172.1(4) applies to a "defence," this Court in *Levigne* interpreted the subsection as forming part of the 172.1 offence, albeit Fish J. was clear that he was not addressing the provision's constitutionality.[65] Consequently, criminal liability for Internet

63 Examples of s. 172.1's application in prosecutions involving an <u>actual underage child</u> are the cases of *R v Dragos*, 2012 ONCA 538 and *R v Saliba*, 2013 ONCA 661.

64 Alan D. Gold, "The Practitioner's Criminal Code" (2017) Lexis Nexus Canada, s. 172.1

65 *Levigne, supra* at ¶32.

luring flows in circumstances not only where the Crown has failed to establish the accused's subjective belief as to the interlocutors age, but also where the accused has failed to take reasonable steps. A reading of the Court of Appeal for Ontario's decision leads to two possible interpretations, both of which raise constitutional issues.

53. *At best*, the Court of Appeal for Ontario's interpretation allows for a conviction where the accused negligently failed to take reasonable steps. Criminal liability attaches where an accused engages in the prohibited communication and *ought* to have believed that the interlocutor is underage. In the context of a sting operation, where the interlocutor is in fact an adult, an accused is thus condemned for negligently believing the actual truth. This mental state, unique to Canadian law, has been characterized as "unreasonable innocent state of mind" or a "negligent lack of criminal belief."[66] The Court of Appeal for Ontario found it inapt to import a "marked departure" standard to the negligence standard given there are no well-established norms on the Internet. It appears that *negligence simpliciter* is sufficient to establish criminal liability in the context of s. 172.1.[67]

54. *At worst*, the Court of Appeal for Ontario's language (underlined above at ¶45) allows for a conviction and requires reasonable steps where there is **"some evidence"** to suggest the interlocutor is underage. On this interpretation, the accused may be required to take reasonable steps in circumstances where even a "reasonable person" would not. For instance, in cases where there is "some evidence" to suggest that the interlocutor is underage, but significant evidence to the contrary, an accused would be required to show steps were taken to ascertain the age of an online interlocutor, even when objectively viewed the circumstances established that it was not reasonably believable that the interlocutor was underage. An accused could be convicted on a standard lower than negligence. Conviction would flow solely from the accused's failure to take reasonable steps.

66 Alan D. Gold, "The Practitioner's Criminal Code", *supra*.
67 *Dragos, supra.*

55. Both the "best" and "worst" interpretations violate s. 7. Guilt is established without full subjective *mens rea.* Section 7 engages broad issues about whether a criminal provision mandates a specific level of *mens rea*. This requirement is in place to ensure that the morally innocent are not convicted and punished. For true criminal offences, rather than regulatory crimes, intent (or knowledge) or recklessness (foreseeability of the prohibited result) is required. In more serious cases, such as murder[68], attempt murder[69] and war crimes[70], the courts have required subjective *mens rea* with respect to all elements of the prohibited act. In more limited cases, objective *mens rea*, coupled with a "marked" or "gross" departure from the reasonable person—*i.e.* criminal negligence—is sufficient. The jurisprudence has long recognized a distinction between true criminal conduct and conduct that while not inherently wrong, is still prohibited to protect the public interest. Historically, this distinction was referred as offences *mala in se* and *mala prohibita*. The modern articulation, post-*R v City of Sault Ste. Marie*, is to classify such offences as either *true crimes* or *regulatory offences* (sometimes referred to as public welfare offences). For true crimes, ones that carry sufficient stigma and a high penalty, only subjective *mens rea* or *gross negligence* will suffice. For regulatory offences, the courts have permitted simple negligence, provided the accused has at a minimum the opportunity to justify their conduct by establishing they acted with due diligence (all reasonable care or mistake of fact). Objective *mens rea*, in the form of gross negligence, is the exception, rather than the norm, for true crimes. In determining what level of *mens rea* is constitutionally required, courts must consider both the *penalty* and the *stigma* of the offence.[71]

56. Unlike other offences that rely upon objective forms of liability (or reasonable steps)—for instance, ss. 150.1 and 273.2(b)—child luring does not require proof of actual harm or of inherently dangerous behaviour. Harmful consequences or inherent dangerousness may support reliance upon

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68 *Vallinacourt, supra*; *R v Martineua*, [1990] 2 SCR 633.
69 *R v Logan* (1990), 58 CCC (3d) 391 (SCC).
70 *R v Finta* (1994), 88 CCC (3d) 417 (SCC).
71 *R v City of Sault Ste. Marie*, [1978] 2 SCR 1299 at 1309 – 1326; *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154; *R v Sansregret*, [1985] SCJ No 23 at ¶¶15 – 18; *R v Creighton*, [1993] SCJ No 91; *Pappajohn*, *supra*.

an objective standard of fault.[72] However for s. 172.1 there is: a) no requirement that the communication take place with an actual child; and b) there is no requirement that the accused even intended to follow through with a sexual offence.[73] Constitutional problems arise when a prohibition extends criminal liability to an imagined offence with imagined people, and there is no evidence of actual harm.[74] The defining feature of every other inchoate offence—*e.g.*, attempt, counselling, and conspiracy—is the requirement for proof of a heightened *mens rea*, usually the subjective intention to commit the complete criminal offence. This requirement for subjective intent provides an essential safeguard to ensure that the inchoate offence is sufficiently proximate to a secondary substantive offence in order to justify a criminal sanction.[75] For that reason, the more remote the harm, the greater the need for a higher degree of subjective fault.

57. Here, the combination of inchoate liability, objective fault and a highly stigmatizing and punitive offence, offends the principles of fundamental justice. To the extent that s. 172.1(4) permits a criminal conviction on the basis of *mere negligence*, or some lesser degree of fault, s. 7 is breached. In cases involving sting operations, where the accused is *in fact* talking to an adult, the operation of s. 172.1(4) results in a situation where a *negligently formed belief*—without reasonable verification—supports a conviction. The accused is condemned for *negligently* (at best) *believing* they were dealing with an adult, posing as an underage minor, without having made sufficient inquiries or, in some cases, without taking any steps. In effect, it prohibits communications when the accused *ought to* have believed the person was underage.[76] This interpretation is problematic. As the underlying conduct is "not in and of itself criminal, illegal or necessarily in appropriate", the *mens rea* (belief that the interlocutor is underage) represents the

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72 *Creighton, supra*; *R v Finlay*, [1993] 3 SCR 103.

73 *Legare, supra* at ¶28.

74 *R v Sharpe*, [2001] 1 SCR 45 at ¶39; *R v Khawaja*, [2012] 3 SCR 555 at ¶¶50 – 51.

75 *R v Déry*, [2006] 2 SCR 669 at ¶45. In the words of Fish J. in *Déry*, proof of a subjective intention allows a court to "situate on a continuum from antisocial contemplation to prohibited conduct — or bad thought to substantive crime — the point where the criminal law intervenes" (*Déry* at ¶43). See also *Alicandro, supra*.

76 See also *Dragos, supra* at ¶¶31 – 35.

entire basis of criminal liability. This is perhaps the reason why Fish J. stated in both *Levigne* and *Legare* that judges should not get caught up in trying to distinguish between *actus reus* and *mens rea*: if liability is based on belief that the interlocutor is underage, criminal wrongdoing turns entirely on the *mens rea*.

58. Moreover, child luring is an offence with significant punishment and stigma. This further suggests a higher level of *mens rea* to comply with s. 7. Even if this Court affirms the unconstitutionality of the one-year mandatory minimum, an offender is still subject to a maximum sentence of 14 years imprisonment and registration on the provincial and federal sex offender registries. The stigma is high. The offender is labelled an online child predator. Both the sanction and stigma point to the conclusion that a person should not be liable for mere negligence.

c) The common law interpretation of "reasonable steps" under s. 172.1(4) further violates s. 7 of the *Charter*

59. Finally, there is a residual concern that the judicial interpretations of what constitutes "reasonable steps" in the context of s. 172.1(4) undermines the accused's right to make full answer and defence. In *Levigne*, Fish J. held that the accused's belief that the website he used had moderators to remove children or that the interlocutor's profile showed "age 18" did not amount to "steps." Rather they were deemed to be merely "circumstances."[77] More recently, in *R v George*, in the context of the reasonable steps requirement under s. 150.1(4), this Court held that "reasonable steps" involve a fact-specific inquiry depending on all the circumstances of an individual case; the more reasonable it is based on the circumstance for the accused to believe the interlocutor is not underage in the circumstances, the fewer steps are reasonably required. Guidance from this Court is needed as to what constitutes a "step" in the context of this particular inchoate offence as well as the timing of when such steps must occur. Should certain factors such as looking at the interlocutor profile age, believing that the chat site is moderated, entering an 18+ chat room, using a role play chat room, *etc*., not amount to a "step" then the accused's ability to make full answer and defence is undermined.

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77 *Levigne*, *supra* at ¶41; *Ghotra*, *supra*; *Dragos*, *supra* at ¶¶32 and 44; *R v Thain*, [2009] OJ No 1022 (CA) at ¶37; *Pengelley*, *supra* at ¶¶10 – 16.

III. DOES THE MANDATORY MINIMUM SENTENCE OF ONE YEAR CONSTITUTE A GROSSLY DISPROPORTIONATE SENTENCE AND IS THEREBY UNCONSTITUTIONAL UNDER S. 12 OF THE *CHARTER*?

a) The one-year mandatory minimum sentence pursuant to s. 172.1(1)(b) of the *Criminal Code* violates s. 12 of the *Charter*

i. General Principles

60. Section 12 balances Parliament's prerogative to fashion appropriate punishments against the individual right to not be subject to punishment that is grossly disproportionate. It is a "high bar for what constitutes cruel and unusual punishment" and the test for gross disproportionality "is aimed at punishments that are more than merely excessive". A grossly disproportionate sentence must be "so excessive as to outrage standards of decency and disproportionate to the extent that Canadians would find the punishment abhorrent or intolerable."[78] The Court must approach the issue of gross disproportionality in two stages. The first stage of the inquiry focuses on the specific facts of the case to determine whether the mandatory minimum sentence would be grossly disproportionate for the particular offence and offender being punished. The second stage goes beyond the facts of the specific case and considers "reasonable hypothetical circumstances."[79]

ii. The case specific inquiry

61. Under the first stage of the analysis, the court considers whether the punishment is grossly disproportionate to the accused before the court. Broader sentencing principles and objectives under s. 718 of the *Code* are relevant in assessing whether the sanction amounts to cruel and unusual punishment. Also relevant are aggravating and mitigating factors, the principle of parity, the principle of totality and the principle of restraint in imposing imprisonment. In reconciling these competing, and in some ways antagonistic principles, the court must have in mind the fundamental principle of proportionality. It is trite law that sentencing is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender and the harm

78 *R v Nur*, 2015 SCC 15 at ¶¶38 – 39; *R v Smith*, [1987] 1 SCR 1045 at ¶¶24 – 69, *per* Lamer J.; *R v Ferguson*, [2008]1 SCR 96 at ¶¶9 – 30.
79 *Nur, supra* at ¶¶47 – 49; *R v Lloyd*, 2016 SCC 13 at ¶22; *Ferguson, supra.*

caused by the crime.[80] General deterrence, while a factor under the s. 12 analysis, should not be given undue weight.[81]

The gravity of the offence

62. In the Court of Appeal for Ontario's decision in *Nur*, Doherty J.A. held:

> The gravity of the offence is measured by reference to the essential elements of the offence that the Crown must prove to establish guilt and not by the circumstances surrounding the commission of the offence in the particular case before the court. The particularized factors are separately addressed in the s. 12 analysis. For the purpose of measuring the gravity of the offence, a more generic approach to the offence is taken.

Harm and moral culpability are the two main considerations that drive the assessment of the gravity of the offence. The greater the harm and the higher the moral culpability, the more serious the crime. Crimes involving actual harm to others will generally be considered more serious than crimes that do not require proof of harm. Likewise, the higher the culpable mental state the greater the moral culpability.[82]

- **The harm caused by the offence**

63. While there can be no doubt that s. 172.1 addresses a very real social harm—to protect children from the risk of sexual exploitation—both the actual harm and the level of culpability may be low depending on the circumstances of the offence. As properly recognized by the trial judge, the actual level of harm may vary significantly from case to case. Factors such as the content of the Internet communications, the duration of the interaction between the accused and interlocutor, whether the accused took further steps to meet with the complainant or whether there was an actual victim involved (as opposed to an undercover officer) all impact the harm or potential harm associated with the offence. In this regard, the harm occasioned by the offence may be significantly, if not entirely, attenuated by factual situations that may fall within the scope of s. 172.1.

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80 *Nur*, *supra* at ¶¶40 – 43.
81 *Nur*, *supra* at ¶¶44 – 45.
82 *Nur*, 2013 ONCA 677 at ¶¶ 77 – 87.

64. While the Respondent accepts that additional steps taken by an accused towards the commission of a secondary sexual offence could provide grounds to lay additional charges, this does not negate the fact that the harm associated with the conduct will depend on the "degree to which the communication advances along the continuum of preparation toward actual commission of the enumerated offence, the nature of the enumerated offence being facilitated and whether the subject communication was abandoned…"[83] Certainly the harm and potential risk of harm for an offender who has a one-time interaction with the underage interlocutor and then abandons any intention to pursue the secondary offence will cause less harm and less risk of harm than an offender who engages in an ongoing dialogue with the interlocutor for an extended period with a goal of meeting the interlocutor and then takes further steps to commit the secondary offence causes more harm and poses a greater risk of harm.[84]

- **The moral culpability of the offender**

65. Similarly, in terms of moral culpability, the interpretation of s. 172.1 advanced by the Court of Appeal for Ontario captures offenders—like the Respondent—whose fault was mere negligence. Where the Crown has failed to prove that the accused believed he was communicating with an underage person, but proved that he failed to take reasonable steps to ascertain age the degree of fault is negligence. Being negligent as to age can only be characterized as less morally

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83 Reasons for s. 12 *Charter* Ruling and Sentence, Ontario Court of Justice dated September 8, 2015.

84 The inchoate nature of the offence itself reduces the actual harm in the context of a sting operation. There is no actual harm caused when the offender speaks to an undercover officer. Crafting a fit sentence requires consideration of the actual harm, as well as moral culpability. Consequences matter. For instance, attempted murder requires that the offender have the same *mens rea* as someone who actually commits murder—*i.e.* a specific intention to kill. However, only a person who carries out an actual killing is subject to life imprisonment (see *R v Ancio*, [1984] 1 SCR 225). It is also worth noting that many of the mandatory minimum sentences for the secondary offences have been deemed unconstitutional in the lower courts on account of gross disproportionality. The secondary offences, and corresponding mandatory minimum sentences that have been deemed unconstitutional, are included in "Appendix A."

blameworthy than an offender who intentionally prowls the Internet to lure an underage child. As stated by the Court of Appeal for Ontario, "it is axiomatic that a person who commits an offence by negligence is less morally blameworthy than someone who intentionally commits a criminal offence."[85] On this interpretation of the impugned provision, the trial judge properly recognized that s. 172.1 may capture offenders who are "unreasonably indifferent to the age of the interlocutor".[86]

66. On the other hand, if this Court disagrees with that approach, then the Respondent agrees that convictions will flow only on the basis of subjective *mens rea* being proven. Nonetheless, the Respondent takes the position that even on such an interpretation of the mental element, the one-year mandatory minimum remains unconstitutional, both in this case and other reasonably foreseeable hypotheticals.[87]

Particular circumstances of the offender and the actual effect of the punishment

67. At the time of the offence the Respondent was a 66-year-old first-time offender. Beyond this offence, he never strayed from the right side of the law:

- he was gainfully employed;

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85 Judgment of the Court of Appeal for Ontario, Appellant's Record, Vol. 1, at ¶121.

86 Reasons for s. 12 *Charter* Ruling and Sentence, Ontario Court of Justice, dated September 8, 2015. To the extent that the Appellant argues at ¶¶78 – 80 of its factum that the trial judge erred in finding that the Respondent was unreasonably indifferent as to age, it is the Respondent's position that this factual finding was available from the evidence and is entitled to significant deference on appeal. The Appellant has failed to establish any palpable and overriding error in relation to this finding of fact.

87 The Respondent agrees with the Appellant at ¶70 of its factum, that if s. 172.1 is interpreted by this Court to include a subjective *mens rea* then the use of reasonable steps solely to restrain a mistake of fact defence would not impact the moral culpability and would act in a manner consistent with mistake of fact defences under s. 273.2(b) and s. 150.1(4) of the *Code*. However, to the extent that s. 172.1(4) incorporates reasonable steps as part of the elements of the offence, as opposed to a limit on a mistake of fact defence, negligence can ground criminal liability.

- had a good relationship with his common-law spouse, Caroline Bos;
- the forensic search of his computer did not disclose indicators of other criminal behavior; and,
- he had complied with his conditions of release.

The trial judge found that a lengthy custodial sentence would not assist the Respondent or advance the goals and principles of sentencing. He held that the Respondent was not likely to re-offend. There was nothing in the evidence to suggest that the Respondent had any other inappropriate involvement with underage children. Nor was there any evidence that the Respondent required rehabilitation. In the trial judge's view, he had already been "significantly chastened by the experience of arrest, the pre-trial custody of five days and the prosecution that he was unlikely to re-offend."[88]

68. The effect of the one-year mandatory minimum requires that a sentence be imposed that is not tailored to the circumstances of the offence and the offender's antecedents. It would result in the incarceration of a first-time offender for a period *three* times longer than the sentence found to be fit by the trial judge. This type of lengthy custodial sentence would have had a particularly harsh impact on the Respondent, including: removing him from his community and family; ending his stable employment; affecting his relationship with his common-law spouse; and generate disrespect and resentment for the law as a result of a seriously disproportionate sentence for a single act. In this respect, the mandatory minimum provokes a palatable sense of unfairness.

The penological goals and sentencing principles

- **Usurping the principle of restraint and contributing to over-incarceration**

69. Canada's problem with over-incarceration was noted by the Supreme Court in *R. v. Gladue* and discussed in further length in *R. v. Proulx*. In *Gladue,* the Court observed that Canada's incarceration rate at the time—approximately 130 prisoners for every 100,000 people—placed us second or third highest among all industrialized democracies. Justices Cory and Iacobucci were

88 Reasons for s. 12 *Charter* Ruling and Sentence, Ontario Court of Justice dated September 8, 2015, ¶85.

particularly harsh in their criticism that incarceration in general is costly, often unduly harsh and, more importantly, "ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals." The principle of restraint, codified in ss. 718.2(d) and (e), was added to the *Code* to address these pressing issues and were defined by Parliament as "fundamental." The effect of mandatory minimum sentences contributes to the over-population problem, which in turn has a direct impact on the sentence conditions under which the Respondent's sentence will be served.[89]

70. The one-year mandatory minimum also undermines the *equally* mandated statutory sentencing principle of restraint under ss. 718.2(d) and (e). The language Parliament employed is important. Subsection (d) qualifies that an accused should not be deprived of liberty when lesser sanctions "may be appropriate." Similarly, subsection (e) states that other sanctions, short of imprisonment, should be considered "for all offenders," though with a particular emphasis on aboriginal offenders. The principle of restraint is inclusive rather than exclusive. It is not limited to only sentences that "are available" by operation of law. In this context, these provisions must be considered to inform the question of whether the mandatory minimum is grossly disproportionate.

71. For first offenders, the main sentencing objectives are individual deterrence and rehabilitation. It has been repeatedly held that sentencing judges should not place undue weight on general deterrence. Where the accused has not previously been incarcerated, the principles of sentencing suggest that a fit sentence should be crafted on the basis that "the shortest possible sentence will achieve the relevant objectives." In these circumstances, the one-year mandatory minimum acts as a blunt instrument, which restrains the trial judge from tailoring the sentence to the individual circumstances.[90]

- **Disconnect between the pressing social problem and a one-year minimum sentence**

89 *R v Gladue*, [1999] 1 SCR 688 at ¶¶ 49 – 57; *R v Proulx*, [2000] 1 SCR 61; J.V. Roberts, *Mandatory Minimum Sentences of Imprisonment: Exploring the Consequences for the Sentencing Process*, 39 Osgoode Hall Law Journal 305 (2001).
90 *R v Priest* (1996), 110 CCC (3d) 289 (CA) at ¶17; *R v Stein*, [1974] OJ No 93 (CA) at ¶4; *R v QB*, [2003] O.J. No 354 (CA) at ¶36.

72. While the Respondent does not dispute the danger posed by child luring as a pressing and substantial concern, there is a clear disconnect between imposing a one-year mandatory minimum for first offenders to address this problem. In fact, prior to the minimum, the typical range of sentence for this offence was between 12 to 24 months but lesser sentences, including non-custodial dispositions, were available in rare cases. The imposition of a one-year mandatory sentence does not markedly increase the normal range applied under the predecessor legislation; however, the increase impacts the "rare" offender whose particular circumstances justify a sentence outside the range. Ironically, those accused who will be mostly affected are those who represent the lower risk to public safety.[91]

The circumstances of the offence

73. The Respondent was an older man who suffered from boredom. He made a poor choice. He explored a sexual chat on the Internet by posting an ad that was "ambiguous about the age of the correspondents" and fell into "criminal culpable error." While the Respondent had an intention to meet the interlocutor, ultimately it was his failure to take reasonable steps when alerted to the possibility that the interlocutor was underage, which attracted criminal responsibility.[92] Further, the communications and the conduct of the Respondent reduced the seriousness of the offence. The communications occurred sporadically over a period of months, did not include a "visually

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91 *R v Folino*, [2005] OJ No 4737 (CA) at ¶25; *R v Jarvis*, [2006] OJ No 3241 (CA) at ¶¶26 – 31; *R v El-Jamel*, [2010] OJ No 3737 (CA) at ¶¶36 – 37, 41 – 42; *Alicandro*, *supra* at ¶¶2, 48 – 49; *R v Brown*, [2014] OJ No 6453 (CJ) at ¶¶11 – 13; *R v Dehesh*, [2010] OJ No. 2817 (SCJ) ¶9.

92 Contrary to the Appellant's position at ¶80 of its factum, there is nothing inconsistent with the trial judge's findings that the Respondent intended to meet the interlocutor and that he was unreasonably indifferent as to the interlocutor's age. The finding that the Respondent, at one time during the course of the communications intended to meet the interlocutor is distinct from the Respondent's belief or wishes as to the age, which in this case was premised on his failure to take reasonable steps to ascertain age.

explicit exchange", only included one "half-hearted attempt to escalate the offence to a face to face encounter", and, importantly, were terminated by the Respondent.[93]

Conclusion on the particularized inquiry

74. The gross disproportionality inquiry for s. 172.1 fails as particularized for the Respondent. Case law prior to the enactment of the mandatory minimum demonstrates that jail sentences below the one-year range were available where the circumstances required it. One of the difficulties is that many of the cases involve a mix of other offences, such as child pornography, sexual interference, breach of probation and other sexually explicit conduct. Importantly, there are no cases where there was a finding that the offender was indifferent as to age, but was convicted on the basis of his failure to take reasonable steps. The fact that the Respondent's conviction hinges on a negligent state of mind diminishes moral blameworthiness and renders the mandatory one-year jail sentence grossly disproportionate.

iii. The contextual inquiry – reasonable hypotheticals

75. Although the trial judge relied on the particularized inquiry, the following reasonable hypotheticals demonstrate situations where the application of the one-year minimum would produce a grossly disproportionate result:

- **Hypothetical #1 – the quick chat offender**: a one-time interaction between an offender and the interlocutor commenced on the basis of an ambiguous listing in terms of the age of the interlocutor sought, such as the listing in the case at bar, on a website designated for 18+ users. A dialogue along the following lines unfolds:

Interlocutor:	Hi my name is Mia.
Offender:	Hi. You can call me Daddy.
Interlocutor:	Fun. I'm 14.
Offender:	Lol. Bullshit. You should touch yourself, that would be fun ☺
Interlocutor:	Hmm… Maybe.

93 Reasons for s. 12 *Charter* Ruling and Sentence, Ontario Court of Justice dated September 8, 2015, at ¶¶62, 74 – 78.

Offender: Btw send me a pic.

This brief dialogue—six communications—would be sufficient to ground the offence. The problem exposed by the hypothetical is that an offender could be liable to serve one year in jail, regardless of his personal antecedents, on the basis of a very brief online conversation. One in which the associated harm is low, as compared to offenders who engage in a persistent dialogue with sexually explicit content or requests. The moral blameworthiness may also be reduced, as the dialogue could be interpreted that the offender did not subjectively believe the interlocutors' age.

- **Hypothetical #2 – the abandoned chat:** using the same dialogue above, if the accused immediately abandons the chat, even where it was because he was concerned about the interlocutor's age—as the offence had already crystalized—he could still be convicted and the mandatory minimum sentence imposed. In these circumstances the moral blameworthiness and potential harm is low, however he would nonetheless be subject to the mandatory minimum sentence. Similarly, if the interlocutor immediately abandoned the chat the offence would have been made out and offender may never have had the opportunity to take reasonable steps and is convicted on the basis of the presumption.

- **Hypothetical #3 - reduced *mens rea* with unreasonable steps:** in a situation similar to the case at bar where the trial judge concludes that the offender was unreasonably indifferent as to age and, while the offender took some steps, they were either insufficient or not objectively reasonable. For example, an offender who wants to engage in a daddy/daughter role-play on a website that includes an 18+ disclaimer. After the interlocutor advised that they are underage and, prior to any sexualized communication, the offender asks for a non-sexual photograph to confirm that she is an adult. The picture is provided. After examining the photograph the offender is satisfied that the interlocutor is not underage. However, a judge upon viewing the photograph makes a contrary finding. The judge decided that the interlocutor did not objectively appear over the age of 16 and therefore finds that the offender failed to take reasonable steps. In this scenario the

blameworthiness of the offender would be even lower than that of the Respondent, but he or she would still be subject to the mandatory minimum sentence.[94]

76. In any of these reasonably foreseeable situations, the mandatory minimum acts as a blunt instrument, which guts the trial judge's ability to tailor a sentence to the individual. Many mitigating factors cannot be applied, which skews proportionality; factors such as an early guilty plea, a first-time offender, a first jail sentence, aboriginal status and low cognitive ability. Similarly, credit for harsh bail conditions or for *Charter* breaches cannot be taken into account in some situations where the trial judge is prohibited from imposing a sentence beneath the mandatory minimum.[95]

77. Recently in *Hood,*[96] the Nova Scotia Court of Appeal found the one-year mandatory minimum sentence to be unconstitutional in light of that offender's personal characteristics that included that she suffered from a serious mental disorder when the offence was committed. The offence in *Hood* was serious and "took place over a period of months, with a lot of planning on Ms. Hood's part." Importantly, this was not a sting operation and that the victims "were Ms. Hood's former pupils made them even more serious." *Hood* provides a real example where the circumstances of the offender—regardless of whether full subjective *mens rea* is proven—show that the one-year mandatory minimum sentence is abhorrent to societal standards of decency.

b) Substituting the 90-day minimum sentence is not an appropriate remedy

78. In the event that the mandatory minimum for indictable convictions under s. 172.1 remains unconstitutional, the Appellant has requested that this Court "read in" the 90-day mandatory minimum sentence where the offence proceeds summarily. This approach ought to be rejected. In *Schoefield,*[97] the court rejected a similar argument, holding that as *per Schacter v Canada,*[98]

94 This is no different than the situation in the case of *Pengelley, supra*, but in reverse.
95 *Priest, supra* at ¶17; *Stein, supra* at ¶4; *R v QB, supra* at ¶36; *R v Nasogaluak*, [2010] 1 SCR 206; *R v Gowdy*, [2016] OJ No 6683 (CA) at ¶¶123 – 128; *R v Donnelly,* [2016] OJ No 6681 (CA) at ¶¶145 – 159; *R v Downes*, [2006] OJ No 555 (CA); *Gladue, supra*.
96 2018 NSCA 18 at ¶¶133 – 156.
97 2018 BCSC 419 at ¶¶42 – 56.
98 [1992] 2 SCR 679.

"reading in" was appropriate only in the "clearest of cases" where there is "as little interference as possible with the will of Parliament." As the Appellant has failed to demonstrate that Parliament intended the 90-day mandatory minimum to apply to indictable offences—but argues that reading in would avoid an "incongruous result"—there is no basis to adopt this approach.[99]

79. Policy considerations further support that the Appellant's approach should be rejected. First, this remedy is advanced for the first time on appeal to this Court. The function of appellate courts is to review lower court decisions. While discretion exists, generally it is preferable this Court have the advantage of reviewing a fulsome record of the litigation below.[100] This Court is denied the review of those arguments, as were the litigants the ability to make them, and the judicial interpretations of the courts below. The Court is being asked to decide the question and applicability of the summary mandatory minimum sentence in the abstract. Second, if the Crown's approach is adopted, future litigants convicted of indictable offences that carry a mandatory minimum sentence will be required to challenge *both* minimum sentences—indictable *and* summary. This needlessly increases the costs and time of litigation.

PART IV – COSTS

80. No request for costs is being made by the Respondent.

PART V – ORDER REQUESTED

81. It is submitted that the Court of Appeal for Ontario's ruling on s. 172.1(3) should be affirmed. This section violates s. 11(d) of the *Charter* and cannot be saved by s. 1. Further, this Court should hold that s. 172.1(4) is of no force and effect by virtue of a violation of s. 7. Finally, the mandatory minimum sentence of one-year is grossly disproportionate and violates s. 12 of the *Charter* and is therefore of no force or effect.

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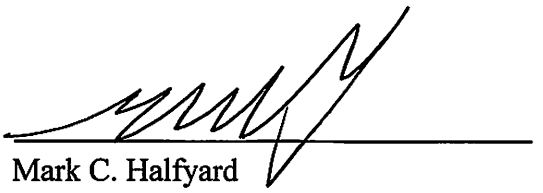
99 If the mandatory minimum sentence for the preparatory offence of s. 172.1 was read to be the same as some of the secondary offences (see "Appendix A"), constitutional concerns can arise where the constitutionality of the 90-day mandatory minimum is more than the completed offence.

100 *R v Tinker*, 2015 ONCA 552 at ¶¶45 – 51; *R v Roach*, 2009 ONCA 156 at ¶¶6 – 7.



FOR Mark C. Halfyard
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PART VI – AUTHORITIES RELIED UPON

Para. No.

JURISPRUDENCE

Para. No.

Secondary Sources

APPENDIX 'A'

Offence	Additional Features	*Criminal Code* provision	Mandatory Minimum Sentence	Constitutional Treatment
Invitation to Sexual Touching	Summary	152(b)	90 days	Held to violate *Charter*: • *R v JG*, 2017 ONCJ 881 Upheld: • *R v Gumban*, 2017 BCPC 226
	Indictable	152 (a)	1 year	Not applied by the Court but not struck down: • *R v Hussein*, 2017 ONSC 4202
Sexual Interference	Summary	151(b)	90 days	Held to violate *Charter*: • *R v Brandon Boeyenga* (Main J, ONCJ, 2-Nov-2016) Upheld: • *R v CF*, 2016 ONCJ 302
	Indictable	151 (a)	1 year	Struck Down: • *R v Hood*, 2018 NSCA 18 • *R v Scofield*, 2018 BCSC 91 and 2018 BCSC 419 • *R v Sarmales*, 2017 ONSC 1869 • *R v Ford*, 2017 ABQB 322 and 2017 ABQB 527 • *R v JED*, 2017 MBPC 33 • *R v SJP*, 2016 NSPC 50 • *R v ML*, 2016 ONSC 7082 • *R v BJT*, 2016 ONSC 6616
Bestiality in the presence of a child	Summary	160(3)(b)	6 months	No known constitutional challenges
	Indictable	160(3)(a)	1 year	No known constitutional challenges
Exposing genitals to a	Summary	173(2)(b)	30 days	No known constitutional challenges

person under the age of 16	Indictable	173(2)(a)	90 days	No known constitutional challenges
Sexual Assault, if the victim is under the age of 16	Summary	271(b)	6 months	No known constitutional challenges
	Indictable	271(a)	1 year	Struck Down: • *R v Deyoung*, 2016 NSPC 67 • *R v ERDR*, 2016 BCSC 684 and 2016 BCSC 1759
Sexual Assault with a weapon, threats or bodily harm	With a firearm	272(2)(a.1)	4 years	No known constitutional challenges
	Against child under 16	272(2)(a.2)	5 years	**Struck Down** • *R v MJ*, 2016 ONSC 2769
	With restricted/ prohibited firearm, or for crim org with any firearm, 1st offence	272(2)(a)(i)	5 years	No known constitutional challenges
	With restricted/ prohibited firearm, or for crim org with any firearm, 2nd offence	272(2)(a)(ii)	7 years	No known constitutional challenges
Aggravated Sexual Assault	With a firearm if the	273(2)(a.1)	4 years	No known constitutional challenges
	Against child under 16	273(2)(a.2)	5 years	No known constitutional challenges

	With restricted/ prohibited firearm, or for crim. org with any firearm, 1st offence	273(2)(a)(i)	5 years	No known constitutional challenges
	With restricted/ prohibited firearm, or for crim org with any firearm, 2nd offence	273(2)(a)(ii)	7 years	No known constitutional challenges
Abduction of person under the age of 16	Indictable	280	No mandatory minim sentence	N/A

File No. 37687

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

Appellant
(Respondent on C61097/
Appellant on C61110)

- and -

DOUGLAS MORRISON

(Appellant on C61097/
Respondent on C61110)
Respondent

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

TAKE NOTICE that I, Mark C. Halfyard, *amicus curiae* for the Respondent, Douglas Morrison, assert that the appeal raises the following constitutional questions:

1. Does the presumption of belief in age in s. 172.1(3) of the *Criminal Code* infringe the right to be presumed innocent under s. 11(d) of the Charter?
2. If there is a s. 11(d) infringement, is it justified under s. 1 of the *Charter*?
3. Is s. 172(4) unconstitutional because it violates s. 7 of the *Charter*?
4. Does the mandatory minimum sentence of one year under s. 172.1(2)(a) of the *Criminal Code* infringe the right not to be subjected to cruel and unusual punishment under s. 12 of the *Charter*?

AND TAKE NOTICE that an Attorney General who intends to intervene with respect to these constitutional questions may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

DATED at Toronto, this 23rd day of March, 2018.

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