SCC Number: 37687

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

BETWEEN:

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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ATTORNEY GENERAL OF ALBERTA
ATTORNEY GENERAL OF QUEBEC
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CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

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Rule 42, *Rules of the Supreme Court of Canada*

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Sexual offending against children is pervasive and heinous. Its effects are often ruinous not just to victims but to society as a whole. The offence of luring a child, as set out in s. 172.1 of the *Criminal Code*[1], seeks to protect children against one of the most insidious form of sexual offending - one in which the victim often becomes a participant in their own abuse.[2]

2. This appeal deals with both the charging provision and the punishment provision of the offence of child luring. The constitutionality of the presumption set out in s. 172.1(3), the reasonable steps requirement in s. 172.1(4) and the mandatory minimum punishment proscribed by s. 172.1(2)(a) are all in issue. Notably, this appeal will mark the first time that this Court has considered the constitutionality of a mandatory minimum sentencing provision in the context of sexual offending against children.

3. The Attorney General of British Columbia ("AGBC") submits that both the presumption and the reasonable steps requirement set out in ss. 172.1(3) and s. 172.1(4) respectively do not infringe on *Charter* rights. In addition, AGBC submits that the mandatory minimum sentence of one year imprisonment does not constitute cruel and unusual punishment in violation of s. 12 of the *Charter*. Furthermore, constitutional challenges to mandatory minimum sentences for sexual offending against children are proliferating. The current framework is applied inconsistently resulting in significant uncertainty and inequity in sentencing for these types of offences.

4. AGBC submits that the current analytical framework for s. 12 *Charter* challenges to mandatory minimum sentences requires clarification. The first step of the analysis, the particularized inquiry, must recognize the importance of the gravity of the offence in the exercise of determining a proportionate sentence. This is particularly so in the context of sexual offending against children. The second stage of the analysis, the application of the mandatory minimum sentence in reasonably foreseeable circumstances, must be limited to consideration of offences as they commonly occur and not scenarios which verge on *de minimus* or may not constitute an offence at all. Nor should reasonable hypotheticals be premised on personal characteristics or mitigating factors requiring individualized analysis such as mental illness, cognitive impairment and/or *Gladue* considerations.

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[1] R.S.C. 1985, c. C-46.
[2] *R. v. Rafiq*, 2015 ONCA 768, para. 44.

5. AGBC further submits that where the indictable mandatory minimum sentence of a hybrid offence is found to infringe s. 12 of the *Charter*, the appropriate remedy is to read in the summary conviction mandatory minimum sentence. This remedy is consistent with the clear intention of Parliament that the offence be punishable by a mandatory minimum sentence regardless of the Crown election.

6. AGBC agrees with and adopts the appellant's overview but takes no position on the facts in this appeal.

PART II – INTERVENER'S POSITION ON APPEAL

7. AGBC intervenes to address the constitutional questions raised by the parties on this appeal.

8. The constitutional questions stated by the appellant[3] in this case are:

> **1. Does s. 172.1(3) of the *Criminal Code* infringe s. 11(d) of the *Canadian Charter of Rights and Freedoms*?**
>
> **2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?**
>
> **3. Does the mandatory minimum sentence of one year imprisonment under s. 172.1(2)(a) of the *Criminal Code* infringe s. 12 of the *Canadian Charter of Rights and Freedoms*?**

9. The respondent stated a further constitutional question on cross-appeal[4]:

> **4. Does s. 172.1(4) of the *Criminal Code* infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?**

10. The AGBC submits that the ss. 172.1(3) and (4) do not, respectively, infringe s. 11(d) or s. 7 of the *Charter*. Further, if this Court does find that s. 172.1(3) does infringe s. 11(d) of the *Charter*, that infringement is justified under s. 1 of the *Charter*. Finally, the AGBC submits that

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[3] *Appellant's Factum,* para. 23. The appellant (referred to as appellant throughout these submissions) is the respondent on the cross-appeal and the respondent (referred to as the respondent throughout these submissions) is the appellant on the cross-appeal.

[4] *Respondent's Factum,* para. 9.

the mandatory minimum sentence proscribed by s. 172.1(2)(a) does not infringe s. 12 of the *Charter*. The primary focus of AGBC's submission will be in respect of the framework for analysis regarding the constitutionality of the mandatory minimum sentence.

PART III – STATEMENT OF ARGUMENT

A. The Presumption of Belief in s. 172.1(3) of the *Criminal Code* Does Not Infringe s. 11(d) of the *Charter*

11. The AGBC agrees with and adopts the appellant's submissions on this issue.

B. Should s. 172.1(3) of the *Criminal Code* Be Found to Infringe s. 11(d) of the *Charter*, the Infringement is Justified under s. 1 of the *Charter*

12. Child luring takes place almost exclusively in cyberspace via various internet-connected computers, phones and other similar devices. The anonymity enabled by cyberspace communication, along with the necessarily inchoate nature of the child luring offence, provides a unique context within which to understand the legislation's objectives and how it operates, and also to examine and apply the *Charter* to the provisions.

13. The rationale for the child luring offence and its distinctive structure is not controversial and has been well canvassed by the jurisprudence. The legislative record[5] supports the statement of Doherty J.A. in *R. v. Alicandro*[6]:

> The language of s. 172.1 leaves no doubt that it was enacted to protect children against the very specific danger posed by certain kinds of communications via computer systems. The Internet is a medium in which adults can engage in anonymous, low visibility and repeated contact with potentially vulnerable children. The Internet can be a fertile

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[5] *House of Commons Debates*, 34th Parl. 3rd Session., Volume VIII, 1992, pp. 9508-9512, 9534 and Volume IX, 1992, pp.12026-12028; *Proceedings of the Senate on Legal and Constitutional Affairs*, 34th Parl. 3rd Sess., Issue No. 29, pp.29:9 – 29:11, 29:24 – 29:30; *House of Commons Debates*, 37th Parl. 1st Sess., Volume 137, No. 54, (May 3, 2001), pp. 3581 – 3582; Debates of the Senate, 37th Parl. 1st Sess., Volume 139, No. 66, (November 1, 2001), pp. 1609 – 1613; Proceedings of the Standing Senate Committee, Issue 20 – Evidence, pp. 1-4; Proceedings of the Standing Senate Committee, Issue 22 – Evidence, pp. 40,49-50; *Debates of the Senate*, 38th Parl. 1st Sess., Volume 142, No. 73 (June 20, 2005), pp.1528- 1532; *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 38th Parl. 1st Sess., Issue No. 17, pp. 17:7 – 17:8, 17:12-17:14,17:18,17:19,17:24-17:28; and *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl. 1st Sess., Issue No. 14, pp.14:73-14:74.

[6] 2009 ONCA 133.

breeding ground for the grooming and preparation associated with the sexual exploitation of children by adults.

14. Section 1 mandates a contextual application which requires that the s. 1 analysis be tailored to the *actual infringement found by the court*. The nature of the breach and the "actual degree" to which a limitation impairs a right is an important consideration.[7] Not all *Charter* infringements are of equal severity and "the seriousness of a particular limit must be judged on a case-by-case basis".[8]

(i) Pressing and Substantial Objective

15. It is beyond dispute that s. 172.1 serves a pressing and substantial objective.

(ii) Proportionality

a. Rational Connection

16. The Court of Appeal also recognized that there is a rational connection between the impugned provision and the state objective. In this regard, it is noteworthy that the accused bears only an *evidential* rather than a persuasive burden. The accused need only adduce *some* evidence, or even point to *any* evidence in the case with an air of reality that he honestly believed the complainant was over the applicable age (the subjective element) and that he took reasonable steps (the objective element; *not* all reasonable steps) as provided for in s. 172.1(4). This will displace the presumption and require the Crown to prove his belief beyond a reasonable doubt.

b. Minimal Impairment

17. AGBC agrees with and adopts the appellant's submissions with respect to minimal impairment.

c. Overall Proportionality

18. AGBC submits that the following factors support the constitutionality of the combined subjective and objective elements and are indicative of how s. 172.1(3) is both minimally impairing of the s. 11(d) *Charter* right and proportional in terms of the minor deleterious effects as weighed against the provision's salutary effects. These factors highlight the operation of the

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[7] *R. v. Sharpe*, [2001] 1 S.C.R. 45, para. 32; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, para. 133.
[8] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, paras. 87,91.

carefully calibrated scheme of s. 172.1 that addresses the pernicious offence of child luring. This is especially challenging because of the offence's *preventive focus* which, like impaired driving, seeks to criminalize conduct that can lead to much graver harm. However, just as these factors support the objective/subjective fault of this unique crime, the ways in which the evidential burden and modest reasonable steps requirement operate establish both the minimal and reasonable nature of the s. 11(d) infringement:

- The purpose of the communications is a determination of what was subjectively in the mind of the accused when the communications were made.[9] The Crown must prove this element, like all elements, beyond a reasonable doubt.

- An accused does not have to take active steps to satisfy that he or she took reasonable steps. Rather, an accused may passively receive relevant information from third party sources that alone, or in combination with information received from the interlocutor satisfy the reasonable steps requirement.[10]

- When considering whether the accused took steps expected of a reasonable person to ascertain the age of the interlocutor, "reasonable steps" are determined in the context of what the accused subjectively knew at the time.[11] In other words, the accused must have taken some steps that were reasonable *in light of the information he or she knew*.

- Despite an evidential burden being placed on an accused of showing he or she took the steps expected of a reasonable person in the accused's situation to determine the interlocutor was not underage, the ultimate burden of proving reasonable steps were not taken or that the steps were not reasonable in the circumstances lies with the prosecution.[12]

- Finally, in terms of moral innocence, it is more than just "antisocial contemplation" for an accused to communicate online with someone who may reasonably be underage *for the purpose of* committing one of the designated secondary offences.

19. Finally, AGBC submits that the following comments of Sopinka J. (for the Court on this point) in *R. v. Laba*[13] apply with the same force to any s. 11(d) *Charter* infringement identified in the case at bar:

> On the other hand, I believe that the imposition of an evidentiary burden upon the accused is justified even though it still impairs the right to be presumed innocent. I find it unlikely that an innocent person will be unable to point to or present some evidence which raises a

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[9] *R. v. Legare*, [2009] 3 S.C.R. 551, para. 35; *Alicandro*, para. 31.
[10] *R. v. Ghotra*, 2016 ONSC 1324, para. 153.
[11] *Ghotra*, paras. 153-4.
[12] *R. v. Levigne*, [2010] 2 S.C.R. 3; *Ghotra*, para. 154.
[13] [1994] 3 S.C.R. 965, para. 100.

> reasonable doubt as to their guilt. Although the imposition of an evidentiary burden violates the presumption of innocence I find that this only minimally increases the likelihood of an innocent person being convicted and represents a justifiable limitation upon the right to be presumed innocent.

20. If this Court finds that the presumption in s. 172.1(3) of the *Criminal Code* infringes s. 11(d) of the *Charter*, *AGBC* asks this Court to find that it is demonstrably justified as a reasonable limit pursuant to s. 1 of the *Charter*.

C. The Requirement to Take All Reasonable Steps in s. 172.1(4) of the *Criminal Code* Does Not Infringe s. 7 of the *Charter*

21. AGBC submits that the reasons of the Court of Appeal are correct in respect of this issue. In *R. v. George*[14], Gascon J., writing for the Court, made the following observations regarding the reasonable steps requirement in s. 150.1(4) of the *Criminal Code*:

> Sexual crimes are disproportionately committed against vulnerable populations, including youth. The "reasonable steps" requirement in s. 150.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46 — which requires an accused person who is five or more years older than a complainant who is 14 years of age or more but under the age of 16, to take "all reasonable steps to ascertain the age of the complainant" before sexual contact — seeks to protect young people from such crimes. It does so by placing the responsibility for preventing adult/youth sexual activity where it belongs: with adults. Parliament's allocation of responsibility to adults is crucial for protecting young people from sexual crimes.

The same considerations apply in respect of the reasonable steps requirement in s. 172.1(4).

D. The Mandatory Minimum Sentence Does Not Infringe s. 12 of the *Charter*

22. Sexual offences committed against children have long been recognized as reprehensible and serious crimes. The "sexual assault of a child is a crime that is abhorrent to Canadian society and society's condemnation of those who commit such offences must be communicated in the clearest of terms. As to moral blameworthiness, the use of a vulnerable child for the sexual gratification of an adult cannot be viewed as anything but a crime demonstrating the worst of intentions".[15]

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[14] [2017] 1 S.C.R. 1021, para. 2.

[15] *R. v. L.F.W.*, [2000] 1 S.C.R. 132**,** para. 31 (per L'Heureux-Dubé J., writing for an equal division, citing with approval from Cameron J.A., writing in dissent, in the court below).

23. Challenges to mandatory minimum sentences are an industry unto themselves - this is particularly so in the case of sexual violations against children. The respondent has provided a chart setting out the constitutional treatment of a variety of mandatory minimum sentences.[16] However, that chart does not represent the full breadth of litigation[17] as a number of decisions remain unreported and the chart does not account for previous mandatory minimum sentences which continue to be the subject of constitutional litigation.

24. The test under s. 12 of the *Charter* is stringent and demanding. As Cory J. noted in *Steele v. Mountain Institution*[18] "[i]t will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*": p. 1417, para. 80. The stringent nature of the analysis was confirmed by Gonthier J. in *R. v. Goltz*[19], p. 501:

> [30] Moreover, it is clear from both *Smith* and *Lyons*, [[1987] 2 S.C.R. 309] that the test is not one which is quick to invalidate sentences crafted by legislators. The means and purposes of legislative bodies are not to be easily upset in a challenge under s. 12. In *Smith*, the Court explained, per Lamer J., at pp. 1088 and 1072:
>
> > A minimum mandatory term of imprisonment is obviously not in and of itself cruel and unusual. The legislature may, in my view, provide for a compulsory term of imprisonment upon conviction for certain offences without infringing rights protected by s. 12 of the *Charter*.
> >
> > …
> >
> > We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12 will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.
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> [Emphasis Added]

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[16] *Appellant's Factum*, Appendix 'A'.
[17] Some examples not included in the chart: *R. v. E.M.Q.*, 2015 BCSC 201; *R. v. Horswill*, 2017 BCSC 35 , appeal pending ; *R. v. Craig*, 2013 BCSC 2098; *R. v. R.R.G.S.*, 2014 BCPC 170; *R. v. Aldersley*, 2018 BCSC 734; *R. v. Hayes* (10 September 2015), Surrey Registry No. 203783-2C (B.C.P.C.) ("Ruling on Application"); *R. v. B.J.C.* (2 September 2016), North Vancouver Registry No. 60869-2C (B.C.P.C.); *R. v. S.A.*, 2016 ONSC 5355; and *R. v. F.C.*, 2016 ONSC 6059.
[18] [1990] 2 S.C.R. 1385.
[19] [1991] 3 S.C.R. 485.

25. This high bar has, in practice, been turned on its head following the majority decisions of this Court in *R. v. Nur*[20] and *R. v. Lloyd*[21]. There often appears to be little deference to Parliament where mandatory minimum sentences are concerned. For example, Bennett J.A., writing for the majority of the court in *R. v. J.L.M.*[22], determined that a fit sentence for the appellant would fall somewhere in a spectrum between a suspended sentence and a six month jail sentence and, as the mandatory minimum sentence of six months materially exceeded the bottom end of the applicable range, she held that the mandatory minimum sentence infringed s. 12: para. 54. A conditional sentence order of nine months was imposed. *J.L.M.* has been, in turn, interpreted to stand for the proposition that "the loss of the option of serving a custodial sentence in the community, in appropriate circumstances, can result in a mandatory minimum sentence being grossly disproportionate"[23], even in the absence of a challenge to s. 742.1 of the *Criminal Code*.

26. In *L.F.W.*, this Court split equally on whether a conditional sentence order was a fit sentence in relation to counts of indecent assault and gross indecency. L'Heureux-Dubé J. held that the trial judge had failed to give sufficient weight to the moral blameworthiness of the offender and thus, the sentence imposed offended the proportionality principle: para. 30. The British Columbia Court of Appeal ("BCCA"), in substituting a conditional sentence order for a sentence of incarceration, found that exceptional circumstances existed and enumerated factors to be considered.[24] Despite subsequent decisions[25] holding that conditional sentence orders will be rare for sexual offences against children, particularly involving a breach of trust, the BCCA continues to apply *Bremner* and uphold conditional sentence orders for such offences.[26]

27. In fact, prior to the enactment of mandatory minimum sentences in 2005, almost half of indictable cases of sexual violations against children resulted in either a conditional sentence (24%) or a suspended sentence (24%).[27] In the case of summary conviction offences, the

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[20] [2015] 1 S.C.R. 773.
[21] [2016] 1 S.C.R. 130.
[22] 2017 BCCA 258, leave to appeal denied [2017] S.C.C.A. No. 386.
[23] *R. v. Swaby*, 2017 BCSC 2020, para. 138, leave to appeal granted 2018 BCCA 35, appeal pending.
[24] *R. v. Bremner*, 2000 BCCA 345.
[25] See for example, *R. v. Safaee*, 2009 BCCA 367.
[26] See for example, *R. v. Chen*, 2017 BCCA 426; *R. v. Cadman*, 2018 BCCA 100.
[27] Statistics Canada, *Mandatory minimum penalties: An analysis of criminal justice outcomes for selected offences*, Juristat Vol. 37, No. 1 (Ottawa, StatCan, August 29, 2017), p. 7-8.

majority resulted in either a suspended sentence (44%) or a conditional sentence (16%).[28] That these types of sentences accounted for more than half the sentences imposed inexorably leads to the conclusion that non-carceral sentences were being imposed with regularity such that the standard for their imposition could not have required exceptional circumstances. This was the environment in which mandatory minimum sentences for sexual offending against children were introduced.

28. The AGBC submits that: (i) the gravity of the offence, and associated moral blameworthiness of the offender, are often not properly weighted in sentencing for sexual offences committed against children generally and particularly in the assessment of the constitutionality of mandatory minimum sentences; (ii) reasonable hypotheticals used to assess whether a mandatory minimum sentence infringes s. 12 in the circumstances of a fictional offence committed by a fictional offender are often not reasonably foreseeable applications of the law; and (iii) in the case of a hybrid offence, where the indictable penalty is found to infringe s. 12 of the *Charter*, the appropriate remedy under s. 52 of the *Constitution Act* is to read in the mandatory minimum sentence, if one is proscribed, for the summary conviction offence.

(i) The Gravity of the Offence

29. There has also been pan-Canadian judicial recognition of the "life-altering consequences that can and often do flow" from sexual offences committed against children[29]. In *R. v. D.L.W.*[30] Romilly J. cited with approval from *R. v. T.L.B.*[31] for the widely accepted proposition that "child sexual abuse 'is a particularly destructive crime which will often have lifelong consequences for the child victims'": para. 68.

30. More recently, Brown J. emphasized a point made by the entire Court in *R. v. K.R.J.*[32] :

> [131] As my colleague Karakatsanis J. aptly notes for the majority, sexual offences against children have "persisted for centuries" (para. 83). Their legacy is toxic. They are notorious for their devastating impact, often ruining the lives of their victims, and of those whose lives intersect with those victims as they move into adulthood. Trauma from

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[28] *Ibid,* p. 8.
[29] *R. v. Woodward,* 2011 ONCA 610**,** para. 76.
[30] 2014 BCSC 43.
[31] 2007 ABCA 61, paras. 20-1.
[32] [2016] 1 S.C.R. 906.

> childhood sexual abuse may reverberate for generations, creating pernicious cycles of abuse.

31. The Alberta Court of Appeal has repeatedly addressed the gravity of sexual offending against children. Recently, the majority of a five member division unmasked a number of the myths and prejudices that permeate sentencing for these types of offences and reiterated the significant moral culpability of offenders who sexually abuse children:[33]

> [7] This case illustrates the imperative need for a starting point for serious acts of sexual interference. It also reveals a disconnect in this area between changing the law and changing attitudes. Despite Parliament's decision to raise the age of consent, the attitude that the *de facto* consent of a 14- or 15-year-old child diminishes the overall degree of moral blameworthiness, that is the seriousness, of the criminal conduct seems to persist in some quarters. Judges are not immune from this attitude.
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> …
>
> [12] Perpetrators who sexually abuse children are more culpable than perpetrators who sexually abuse adults, not less.
>
> …
>
> [67] There is another aspect of the harm caused by an offender who commits an act of major sexual interference. That is the harm caused to society, including both the broader community and the child's family. The criminal law operates to protect the vulnerable not just by punishing those who subject the vulnerable to risk of harm, but by reinforcing the message that we condemn the attitude which promotes such conduct. Nor is there any room in our diverse and tolerant society for so-called cultural distinctions either. Devaluation of any members of society is an evil in itself, as well as criminal. It is not just that child victims suffer from these crimes, although plainly that is enough to justify the effort to protect children. Society as a whole is diminished and degraded.
>
> [68] Moreover, it is society that bears a substantial portion of the consequences flowing from the societal problems that premature sexual activity between a child and an adult offender often produce. And it is society that must typically pick up the pieces when child abuse in one generation leads to ramifications over generations. The harm inherent in the crime of sexual interference extends well beyond the one child victim. Harm to any child in the community affects the rights and security of everyone because perpetrators of crimes against children strike a blow directly at one of the core values in our society – protection of children.

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[33] *R. v. Hajar*, 2016 ABCA 222.

> …
>
> [70] Courts may not be able to stop those intent on abusing children. But given the scope of harm caused by crimes involving child sexual abuse, those determined to commit them should know that, as stated in *D(D), supra* at para. 45:"… prey upon innocent children and you will pay a heavy price!"
>
> …
>
> [155] Luring of a child is a serious offence because the Internet provides those intent on abusing children with access to them that would almost certainly be blocked in their own homes: *R v Legare*, 2009 SCC 56 (CanLII) at para 26, [2009] 3 SCR 551. Hajar's use of the Internet required planning and deliberation. The ease with which this offence can be committed and its prevalence and long reach are all factors which speak to the need for this Court to strongly discourage and denounce this modern criminality: see *R v Paradee*, 2013 ABCA 41 (CanLII) at para 12, 542 AR 222 [*Paradee*]. This offence too falls within the scope of s 718.01 of the *Code* which requires that, in sentencing, primary consideration be given to the objectives of denunciation and deterrence.

32. With respect to the specific offence of child luring, the gravity of that offence was judicially acknowledged prior to the enactment of mandatory minimum sentences.[34] Following the enactment of mandatory minimum sentences, courts have continued to recognize that child luring is a grave offence.[35] The devastation wrought by the offence when the victim is an actual child is well documented:

> We know better now than we did then. We have come to understand the full magnitude of the impact such crimes have on children and that some have even resorted to suicide to find relief from online tormentors. In fact, one of the victims here reported having thoughts of suicide to escape the appellant. This and the other victim impact statements in this case are poignant reminders of the trauma and suffering caused by these crimes.[36]

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[34] See for example, *R. v. Folino*, [2005] O.J. No. 4737 (ONCA).
[35] See for example, *R. v. Woodward*, 2011 ONCA 610; *R. v. Reynard*, 2015 BCCA 455; and *R. v. Hammermeister*, 2016 ABCA 302.
[36] *R. v. Mackie*, 2014 ABCA 221, para. 17; see also *R. v. Clarke (No. 2)*, 2018 NLPC 1317A00793 and *R. v. Shaw*, 2018 BCPC 77.

33. Parliament has also recognized the gravity of sexual offending against children. As noted in the preamble to *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*[37]:

> WHEREAS the Parliament of Canada has grave concerns regarding the vulnerability of children to all forms of exploitation, including child pornography, sexual exploitation, abuse and neglect;
>
> WHEREAS Canada, by ratifying the United Nations Convention on the Rights of the Child, has undertaken to protect children from all forms of sexual exploitation and sexual abuse, and has obligations as a signatory to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;
>
> WHEREAS the Parliament of Canada wishes to encourage the participation of witnesses in the criminal justice system through the use of protective measures that seek to facilitate the participation of children and other vulnerable witnesses while ensuring that the rights of accused persons are respected;
>
> AND WHEREAS the continuing advancements in the development of new technologies, while having social and economic benefits, facilitate sexual exploitation and breaches of privacy;
>
> NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: ...

34. That Act introduced mandatory minimum sentences for a number of sexual offences committed against children.

35. Despite this Parliamentary and judicial consensus, courts often fail to assign sufficient weight to the gravity of the offence in determining s. 12 *Charter* challenges to mandatory minimum sentences in the specific context of sexual offending against children. For example, in *R. v. Scofield*[38], where the offender engaged in sexual intercourse with two 15 year old girls, Weatherill J. held that the harm caused by the offence was "militated by" the offender's diminished mental capacities, the nature of the relationships (found to be "consensual"), and the lack of any violence, threat, intimidation or exploitation: para. 122. In *R. v. S.J.P.*[39], the gravity of the offence was artificially reduced on the premise that there was no victim impact as the

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[37] S.C. 2005, c. 32.
[38] 2018 BCSC 91, appeal to BCCA pending.
[39] 2016 NSPC 50.

victim - the offender's daughter - would be too young to remember what happened and that essentially the offence was over for the victim the moment the offender stopped: paras. 109-11. The court also determined gross disproportionality on the basis of mathematical ratios: paras. 116-9.[40]

36. The AGBC submits that the gravity of the offence must be a critical consideration in assessing whether a mandatory minimum sentence offends s. 12 of the *Charter*. Further, the gravity of sexual offences against children is very high. While there may be a spectrum of offending behaviour, any sexual violation of a child is *prima facie* a very severe offence. The absence of aggravating factors such as actual violence, threats, and higher degrees of invasiveness do not undercut the inherent gravity of the offence.

(ii) Reasonable Hypotheticals

37. *Nur* was the first time that this Court had considered a mandatory minimum sentence involving a hybrid offence. McLachlin C.J.C. (as she then was) held that the Crown's discretion to proceed summarily could not insulate an otherwise unconstitutional law: para. 91. As such, the full range of offending contemplated by the offence provision may be considered in determining whether the mandatory minimum sentence infringes s. 12 of the *Charter*. She did, however, exclude the "use of personal features to construct the most innocent and sympathetic case imaginable" because almost any mandatory minimum could thereby infringe s. 12 and "lawyerly ingenuity" would be the only limit to findings of unconstitutionality: para. 75. In *Lloyd*, McLachlin C.J.C, again writing for the majority, held that mandatory minimums for offences that can be committed in a variety of ways, in many different circumstances, and by a wide range of offenders, are constitutionally vulnerable: para. 27.

38. In practice, the proscription against hyper-individualization from this Court in *Nur* and *Lloyd* has been ignored and instead hypotheticals which violate it are used to invalidate mandatory minimum sentences. This is done on the basis of allegedly reasonably foreseeable circumstances that involve highly individualized mitigating circumstances which, without the

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[40] The problem with this approach is that, for example, a sentence of 7 days jail would likely not be grossly disproportionate despite being 7 times greater than the 1 day sentence a judge determined to be fit.

array of specific information typically provided to the court in respect of the individual offender being sentenced, are incapable of being properly assessed in terms of their impact on moral culpability. In other cases, courts resort to imagined scenarios that may not actually constitute an offence.

39. By way of example, in *R. v. Hood*[41], the court considered the following hypothetical:

> [150] For example, consider a first-year high school teacher in her late 20's with no criminal record. She suffers from the same mental health challenges as Ms. Hood. One evening, she texts her 15 year old student ostensibly to inquire about a school assignment. Feeling manic, she directs the conversation from casual to sexual. They agree to meet that same evening in a private location where they fondle each other. That was their one and only sexual encounter. Consider further a guilty plea, coupled with the teacher's sincere remorse.

The court held that this hypothetical would render the mandatory minimum sentences for sexual interference, child luring and, if the student was 17 sexual exploitation, cruel and unusual: paras. 149-54.

40. This "reasonable" hypothetical is, in AGBC's submission, an example of using personal characteristics to create the most sympathetic offender possible. Mental health and/or cognitive impairment may reduce an offender's moral blameworthiness, and in that way, it can be treated as a mitigating factor on sentence provided that there are no public safety concerns arising from the mental illness *and* there is evidence that the disability "played a central role in the commission of the offence.[42] In *Hood*, the need for individualized and contextual consideration of the relationship between mental health and moral culpability is self-evident in that the conviction appeal was based on whether the offender should have been found not criminally responsible by reason of mental disorder and therefore required careful consideration of expert evidence and the relationship between the mental illness and the commission of the offence. That exercise was specific to the offender, the circumstances of the offence and the evidence before the court.

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[41] 2018 NSCA 18.

[42] *R. v. Laskowski*, 2015 BCCA 248, para. 17; *R. v. Batisse*, 2009 ONCA 114, para. 38; *R. v. Ramsay*, 2012 ABCA 257, para. 19.

41. Similarly, in *Swaby*, where the challenge was to the 90 day mandatory minimum sentence in summary proceedings for the offence of possession of child pornography, the court considered the following as a reasonable hypothetical:

> [154] In my view, a reasonable hypothetical can be created by combining one of the hypothetical circumstances considered in *LeCourtois* with one of the hypothetical offenders described in *J.L.M.* In my view, a sentence of 90 days' jail would be abhorrent and intolerable to Canadians informed of brief and inadvertent possession of one item of the least depraved child pornography by a person with the mental function of a young teenager. This conclusion would not be based on compassion but on a consideration of the less serious nature of the offence combined with the reduced moral blameworthiness of the offender. Absent a mandatory minimum sentence, a suspended sentence and probation would be well within the range of fit sentences in such circumstances.

42. In *Swaby*, Marchand J. took the concept of reasonable hypotheticals one step further, using the fictitious range of sentence for the hypothetical offenders in other cases considering the constitutionality of mandatory minimum sentences for the possession of child pornography to expand the range of sentence applicable to the actual offender before the court: paras. 89-92.

43. In *R. v. E.R.D.R.*[43], the indictable one year mandatory minimum for sexual assault where the victim is under the age of 16 years was found to infringe s. 12 on the basis of the following reasonable hypothetical: a young, just turned 18-year-old, with no record, who steals a kiss from, or perhaps lays a hand on an almost 16-year-old's leg while on a bus, or touches her on the breast at a party while he is intoxicated.[44] Beames J. failed to consider that, with consent, the alleged offence would fall within the close in age exception. Even leaving aside the issue of consent, it is not clear that these scenarios would constitute an offence as, for example, it is not evident that the touching of a leg would constitute a sexual assault without more information about the surrounding circumstances.

44. Similarly, in *R. v. Deyoung*[45], the ages of the offender and victim were manipulated to fall just outside the close in age exception and the circumstances said to consist of non-exploitative, consensual, and minimally forceful sexual contact: paras. 43-5. The mandatory minimum sentence was found to infringe s. 12 on the basis of the disparity between a hypothetical where the impugned act would fall within the close in age exception and, thus, not attract any

[43] 2016 BCSC 684.
[44] Para. 28.
[45] 2016 NSPC 67.

punishment and one in which the impugned act fell outside the parameters of the exception, by mere days, and thus required the imposition of the mandatory minimum sentence: paras. 45-6.

45. Bennett J.A., in *J.L.M.*, considered a reasonable hypothetical of an offender who paid a person under the age of 18 for a kiss or, alternatively, a naïve 18 year old who awkwardly propositions a more sophisticated 17 year old classmate with money for a sexual service: paras. 56-60. Saunders J.A., in dissent, observed that the first hypothetical would not necessarily constitute an offence nor would the facts in either scenario likely result in charges let alone convictions: para. 102.

46. It is clear that the important and specific limitations imposed by this Court on the construction of reasonably foreseeable circumstances are being ignored, with the result that Parliamentary choices concerning mandatory minimum sentences are being subjected to an overly broad constitutional standard. AGBC submits that reasonable hypotheticals must not include personal characteristics that would, in the ordinary course, require evidence about those characteristics to be placed before the sentencing court such that their effect on the moral blameworthiness of the offender can be properly assessed in the context of the offence as committed. Such characteristics include cognitive impairment, mental illness and consideration of the *Gladue* factors in the case of aboriginal offenders. These are highly nuanced and case specific, and to consider them in the context of a hypothetical is to submit the analysis to the limitless and relentless individualization that this Court has eschewed.

47. Similarly, reasonable hypotheticals should not be constructed based on scenarios which may or may not constitute an offence or verge on *de minimus* such that an offence would not be charged. Reasonable hypotheticals should be restricted to a consideration of offences as they commonly occur rather than creating a quilt of circumstances and personal characteristics constructed solely to defeat a mandatory minimum sentence.

(iii) Remedy

48. Parliament first enacted mandatory minimums for several sexual offences committed against children in 2005. Those mandatory minimums were increased, and new mandatory minimums enacted, in 2012 via the *Safe Streets and Communities Act*, S.C. 2012, c. 1 [in force August 9, 2012]. Further changes to the sentencing provisions for sexual offending against

children were enacted in 2015. The majority of these offences may be prosecuted either summarily or by indictment. Striking the indictable mandatory minimum sentence creates incongruity and unfairness and does not reflect Parliament's clear intention that there be a mandatory minimum sentence regardless of a Crown election.

49. Ordinarily, where a mandatory minimum sentence is found to violate s. 12 of the *Charter* and is not saved under s.1, the appropriate remedy would be to strike the provision. However, the situation before this Court, namely that another, but different, mandatory minimum sentence is proscribed where the offence is prosecuted summarily, has not been previously dealt with by this Court.

50. AGBC submits that the appropriate remedy in these circumstances is to read in the same mandatory minimum as that provided for in s. 172.1(2)(b). It should be noted that similar summary mandatory minimum sentences for sexual offending against children have withstood constitutional scrutiny.[46]

51. In *Schachter v. Canada*[47], this Court considered the issue of whether severance or reading in were appropriate remedies. The Court noted that reading in is the logical counterpart of severance and serves the same purposes. Courts should not read in where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. To do so would amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution: paras. 51-56.

52. This Court posited the test as to whether to read in or sever, based on whether doing so would be an illegitimate intrusion into the legislative sphere, as asking whether the significance of the part which would remain would be substantially changed when the offending part is excised: para. 64.

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[46] *R. v. R.R.G.S.*, 2014 BCPC 170; *R. v. Hayes* (10 September 2015), Surrey Registry No. 203783-2C (B.C.P.C.) ("Ruling on Application"); *R. v. B.J.C.* (2 September 2016), North Vancouver Registry No. 60869-2C (B.C.P.C.); *R. v. Gumban*, 2017 BCPC 226; and *R. v. C.F.* 2016 ONCJ 302.

[47] [1992] 2 S.C.R. 679.

53. Severance or reading in will only be warranted in the clearest of cases where each of the following criteria is met:

a. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;

b. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,

c. severance or reading in would not involve an intrusion into the legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question: para. 84.

54. In *R. v. Ferguson*[48], this Court considered the issue of the appropriate remedy for a s. 12 breach in the context of an application for a constitutional exemption:

> [51] When a court opts for severance or reading in as an alternative to striking down a provision, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court by means of severance or reading in. For instance, as this Court noted in *Schachter*, the test for severance "recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part" (p. 697). If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court — or if it is probable that Parliament would *not* have passed the scheme with these modifications — then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere. In such cases, the least intrusive remedy is to strike down the constitutionally defective legislation under s. 52. It is then left up to Parliament to decide what legislative response, if any, is appropriate.

55. The issue of the appropriate constitutional remedy for a s. 12 violation was considered more recently in *R. v. Vu*[49]. In that case, Durno J. concluded that severance was an appropriate remedy after he found that the mandatory minimum sentences in ss. 7(b)(i) and (ii) of the *Controlled Drugs and Substances Act*[50], the sentences at the "lowest rung" of the *CDSA* ladder,

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[48] [2008] 1 S.C.R. 96.
[49] 2015 ONSC 7965.
[50] S.C. 1996, c. 19.

were unconstitutional. He held that an unjustifiable infringement of s. 12 in relation to two subsections did not mean that all six subsections of s. 7(2)(b) should be struck. To have done so would be inconsistent with the will of Parliament: paras. 35-48.

56. Applying the law to the sentencing regime set out in ss. 172.1(2)(a) and (b)[51], the least intrusive measure would be to read in the summary mandatory minimum sentence. The legislative objective is obvious and has been made clear by both the courts and Parliament. Reading in would constitute a lesser interference than striking the provision. It would not constitute an unacceptable intrusion into the legislative domain given that the mandatory minimum sentence in s. 172.1(2)(b) is the one enacted by Parliament at the same time for the same offence when prosecuted summarily. Finally, no budgetary concerns arise from reading in.

57. If this Court were simply to strike the provision, the result would be anomalous, as it is in British Columbia for the offences of sexual interference and sexual assault (where the victim is under the age of 16 years). There would be a mandatory minimum sentence where the Crown elects to proceed by summary conviction – presumptively for less serious offences. But there would be no mandatory minimum sentence for those offences prosecuted by indictment which are expected to be the more serious offences. Furthermore, the absence of a mandatory minimum sentence would defeat Parliament's clear intention to make conditional sentence orders unavailable for sexual offences committed against a child; such sentences would be available only where prosecuted by indictment, but not by summary conviction.[52] Finally, striking the provision would most likely result in constitutional challenges to the summary mandatory minimum sentence not on the basis that it constitutes cruel and unusual punishment in and of itself, but on the basis that it arbitrarily creates a harsher sentencing regime for the offence when it is prosecuted summarily. Clearly it was not Parliament's intent to create a harsher sentencing regime for offences prosecuted summarily rather than by indictment.

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[51] And by extension, all hybrid offences where mandatory minimum sentences are proscribed both for summary conviction offences and for indictable offences.

[52] The availability of conditional sentence orders is complicated in that some offences, like sexual assault, are statutorily barred. Others are barred by virtue of the increase in the maximum sentence enacted in 2015.

58. For example, the indictable mandatory minimum sentence for sexual assault where the victim is under the age of 16 was struck in *R. v. E.R.D.R.*[53]. The Crown's submission that the appropriate remedy would have been to read in the summary 90 day mandatory minimum was rejected by the sentencing judge. The result is that in British Columbia, there is no mandatory minimum sentence where the offence is prosecuted by indictment and a mandatory minimum sentence where prosecuted summarily.

59. The respondent suggests that if this Court adopts the approach of the appellant with respect to remedy, future offenders convicted of indictable offences will be required to challenge both minimum sentences, indictable and summary and that this will needlessly increase the costs and time of litigation.[54] AGBC submits that the full gamut of a hybrid offence is already before a court deciding the constitutional validity of a mandatory minimum sentence. There is no additional cost to considering the constitutionality of the summary mandatory minimum sentence. The remedy of reading in the summary conviction mandatory minimum as proposed by the appellant is appropriate in the circumstances of a hybrid offence.

PART IV – SUBMISSIONS CONCERNING COSTS

60. The AGBC makes no submissions on costs.

PART V – ORDER SOUGHT

61. The AGBC seeks no order in connection with this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Lara Vizsolyi
Counsel for the Intervener
Attorney General for British Columbia

dated this 9th day of May, 2018
at Victoria, British Columbia

[53] 2016 BCSC 1759
[54] *Appellant's Factum*, para. 79.

PART VI – LIST OF AUTHORITIES

Para No.

Statutory Provisions

Para No.

Other Sources

Para No.