S.C.C. Court 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)

A N D:

DOUGLAS MORRISON

Respondent
(Appellant on C61097/
Respondent on C61110)

A N D:

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

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TABLE OF CONTENTS

Page No.

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Internet is an open door to the sexual exploitation of children by adults. Section 172.1 of the *Criminal Code* aims to close that door. Undercover operations in which police officers pose as children with a view to catching sexual predators lurking on the Internet are essential to achieving the objectives of s. 172.1. Section 172.1(3) acts as a sword in this regard by creating a rebuttable presumption that facilitates the investigation and prosecution of child Internet luring while enabling law enforcement to identify and apprehend online sexual predators before they can harm children.

2. Section 172.1(3) does not offend the presumption of innocence. If it does, any infringement is a reasonable limit on s. 11(d) of the *Charter*. The Ontario Court of Appeal's s. 1 analysis inaccurately depicts the realities of child Internet luring. The Court wrongly assumed that it is always possible to create an extensive evidentiary record on the issue of belief of age. However, the preventive objective of the legislation of protecting children from harm may require police to intervene before a comprehensive record can be compiled. The Court also failed to realize that the presumption of belief also applies in cases involving real child victims in which the need for police to intervene quickly may be even more pressing. This flawed analysis led the Court of Appeal to err in concluding that s. 172.1(3) is neither minimally impairing nor proportionate.

3. Section 172.1(3) facilitates the investigation and prosecution of child Internet luring where the record does not contain evidence that permits the trier of fact to infer that an accused believed that the target of their communications was underage. The presumption of belief applies where the representation to the accused that the target is underage is the sole evidence on this issue.

4. The preventive objective of s. 172.1(3) can only be met if law enforcement is able to close the cyberspace door to sexual predators before they prey on real child victims. To prolong an investigation to compile a record like that contemplated by the Court of Appeal would expose children to harm and subvert the objectives of the legislation.

5. Any infringement of s. 11(d) is marginal in terms of its seriousness. It is not onerous for an accused to avoid the operation of the presumption. Section 172.1(3) is both minimally impairing of s. 11(d) and its salutary effects outweigh any deleterious effects.

6. The reasonable steps requirement in s. 172.1(4) operates according to a modified objective standard and does not violate s. 7 of the *Charter*. This requirement assigns responsibility for protecting children from online sexual exploitation to adults who choose to use the Internet for their

own sexual gratification by requiring these individuals to take reasonable steps to ensure that the target of their sexual solicitations is not a child.

7. If s. 172.1(4) infringes s. 7, any limit is reasonable under s. 1. Section 172.1 is aimed at safeguarding the s. 7 interests of one of the most vulnerable groups in society – the security interests of children in protecting them from the harms associated with child Internet luring. To the extent that the s. 7 interests of an adult accused and a child victim are both implicated by the reasonable steps requirement, the interests of children should prevail.

B. Facts

8. The Attorney General of Canada accepts the facts as stated by the parties to this appeal and takes no position with respect to any factual disputes between them.

PART II – RESPONSE TO THE QUESTIONS IN ISSUE

9. The Attorney General of Canada intervenes in this appeal on the constitutionality of ss. 172.1(3) and 172.1(4) of the *Criminal Code*.

10. The presumption of belief of age provision in s. 172.1(3) of the *Code* does not offend the presumption of innocence under s. 11(d) of the *Charter*. If it does, any infringement is a reasonable limit on that right under s. 1.

11. The reasonable steps requirement under s. 172.1(4) of the *Code* is not contrary to the principles of fundamental justice guaranteed by s. 7 of the *Charter*. If it is, any infringement is a reasonable limit on that right under s. 1.

PART III – ARGUMENT

A. The Offence of Child Luring and the Interplay between Sections 172.1(3) and 172.1(4)

12. Section 172.1 of the *Code* makes it an offence to intentionally communicate by computer with an underage person for the purpose of facilitating the commission of an offence specified in s. 172.1(a)-(c), namely, abduction or one of the designated sexual offences.[1]

13. Section 172.1(3) deals with proof that an accused believed that a person was underage and 172.1(4) pertains to whether the accused took reasonable steps to ascertain the person's age where the accused maintains that he or she did not believe the person to be underage. As Fish J. explained in *R. v. Levigne*, the two provisions should be understood as operating together in the following fashion:

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[1] *R. v. Legare*, [2009] 3 S.C.R. 551, 2009 SCC 56 ("*Legare*") at para. 3.

1. Where it has been represented to the accused that the person with whom he or she is communicating by computer (the "interlocutor") is underage, the accused is presumed to have believed that the interlocutor was in fact underage.
2. This presumption is rebuttable: It will be displaced by evidence to the contrary, which must include evidence that the accused took steps to ascertain the real age of the interlocutor. Objectively considered, the steps taken must be reasonable in the circumstances.
3. The prosecution will fail where the accused took reasonable steps to ascertain the age of his or her interlocutor and believed that the interlocutor was not underage. In this regard, the evidential burden is on the accused but the persuasive burden is on the Crown.
4. Such evidence will at once constitute "evidence to the contrary" under s. 172.1(3) and satisfy the "reasonable steps" requirement of s. 172.1(4).
5. Where the evidential burden of the accused has been discharged, he or she must be acquitted if the trier of fact is left with a reasonable doubt whether the accused in fact believed that his or her interlocutor was not underage.[2]

14. The presumption of belief in s. 172.1(3) and the reasonable steps requirement in s. 172.1(4) function interdependently. If a person, whether an undercover police officer or a real child victim, represents to an adult that he or she is underage, this representation triggers the reasonable steps requirement to ensure that the adult is not harming a child.

15. If an adult in this situation fails to take such steps then, in the absence of evidence to the contrary, s. 172.1(3) allows the Crown to rely on the representation as proof that the adult believed that the target of their communications was underage and s. 172.1(4) precludes the adult from raising the defence of mistaken belief that the person was not underage.

B. Section 172.1(3) Does Not Violate the Presumption of Innocence under Section 11(d)

16. The presumption of belief does not limit the right to be presumed innocent under s. 11(d) of the *Charter*. The Attorney General of Canada adopts in this regard the submissions of the Appellant.[3]

17. Section 172.1(3) imposes an evidential and not a persuasive burden on an accused. It does not relieve the Crown of its burden of establishing beyond a reasonable doubt that the accused believed he or she was communicating with an underage person. Moreover, the trier of fact is still required to acquit if there exists a reasonable doubt on this issue. The presumption permits the trier of fact to infer that the accused believed he or she was communicating with a child based on the

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[2] *R. v. Levigne*, [2010] 2 S.C.R. 3, 2010 SCC 25 ("*Levigne*) at para. 32.

[3] Appellant's Factum at paras. 25-42.

target of his or her communications representing to the accused that the target was underage where the only evidence on the issue of belief of age is this representation.[4]

18. Section 172.1(3) does not offend the presumption of innocence because it would be unreasonable for the trier of fact to conclude that there exists a reasonable doubt on the issue of belief of age where the *only* evidence on this issue is the target of the communications representing himself or herself as underage. The only reasonable inference in these circumstances is that, in the absence of evidence to the contrary, the accused believed this representation to be true.[5]

C. Any Limit on the Presumption of Innocence is Justifiable under Section 1 of the *Charter*

19. In the event that s. 172.1(3) is found to infringe s. 11(d), any limit on the presumption of innocence is a reasonable limit prescribed by law under *R. v. Oakes*.[6]

20. The Court of Appeal found that s. 172.1(3) is neither minimally impairing nor proportionate but otherwise satisfies the *Oakes* test.[7] The Court erred in reaching its conclusions on minimal impairment and proportionality.

(i) Section 172.1(3) Protects Children as a Vulnerable Group from Online Sexual Exploitation by Adults and Facilitates the Investigation and Prosecution of this Conduct

21. Because the legislative goal "grounds the minimal impairment analysis"[8], it is crucial to understand the different strands of the pressing and substantial objectives underlying s. 172.1(3).

22. Section 172.1(3) responds to two interrelated pressing and substantial objectives: protecting children from online sexual exploitation by adults and facilitating the investigation and prosecution of this conduct.[9] It is important to consider the different aspects of these twin objectives. Just as sexual offences targeting children are multi-faceted in their harmful effects, measures aimed at preventing these types of offences are also multi-faceted in terms of their objectives.[10]

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[4] *Levigne* at para. 30.

[5] *R. v. Ghotra*, 2016 ONSC 1324 at para. 125.

[6] *R. v. Oakes*, [1986] 1 S.C.R. 103 ("*Oakes*").

[7] Appellant's Record ("AR"), Vol. 1, Tab 4 at pp. 72-73, Reasons for Judgment of the Court of Appeal at paras. 71-76.

[8] *Alberta v. Hutterian Brethen of Wilson Colony*, [2009] 2 S.C.R. 567, 2009 SCC 37 ("*Hutterian*") at para. 54.

[9] *Legare* at para. 26 citing *R. v. Alicandro* (2009), 95 O.R. (3d) 173 (C.A.), 2009 ONCA 133 ("*Alicandro*") at para. 6.

[10] *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R 906 at p. 948 *per* McLachlin J., as she then was.

23. When s. 172.1(3) was enacted in 2002, the Minister of Justice explained that it was introduced to respond to the "growing phenomenon" of child Internet luring. The Minister described its objective as being "to safeguard children from criminals on the Internet and to ensure that children are protected from those who would prey upon their vulnerability." The Minister stated that "Canadians will not tolerate a situation where individuals, from the safety and secrecy of their house, use the anonymity of the Internet to lure children into situations where they can be sexually exploited."[11]

24. Protecting children from harm is "a basic tenet of our legal system."[12] This need for protection flows from the inherent vulnerability of children.[13] As this Court stated in *R v. Sharpe*, "[b]ecause of their physical, mental, and emotional immaturity, children are one of the most vulnerable groups in society."[14] This heightened vulnerability is attributable to chronology, not temperament.[15] Thus, *all* children are in need of protection. Children who have experienced difficult life circumstances are "doubly vulnerable"[16] and are in need of greater protection.

25. Protecting children from sexual offences is a compelling objective.[17] Children as a group are vulnerable as potential victims of sexual offences and troubled children are more vulnerable than most.[18] As this Court held in *R. v. K.R.J.*, "[p]roviding enhanced protection to children from becoming victims of sexual offences is vital in a free and democratic society." [Emphasis added.][19]

26. What distinguishes the Internet from other environments is that adults who would otherwise be responsible for protecting children from harm tend not to be present when children are online. At the same time, it is adults who prey on children in this largely unsupervised environment. With the

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[11] Canada. House of Commons. *House of Commons Debates*, 37th Parl., 1st Sess., Vol. 137, No. 054 (3 May 2001) (Hon. Anne McLellan, Minister of Justice and Attorney General of Canada) at p. 3581.

[12] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (*"B. (R.)"*) at para. 88 *per* La Forest J. See also *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30 ("*A.C.*") at para. 104.

[13] *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567, 2012 SCC 46 ("*Bragg*") at para. 17.

[14] *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 ("*Sharpe*") at para. 169.

[15] *Bragg* at para. 17.

[16] *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51 at para. 36.

[17] *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48 at para. 73.

[18] *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 at para. 19.

[19] *R. v. K.R.J.*, [2016] 1 S.C.R. 906, 2016 SCC 31 ("*K.R.J.*") at para. 66.

Internet, "an environment exists for strangers to access young persons outside the scrutiny of those responsible for their protection – a new reality for child vulnerability."[20]

27. For these reasons, the Internet is an "open door" for the sexual exploitation of children by adults.[21] As this Court has found, it "is increasingly being used to sexually offend against young people."[22] Section 172.1(3) was enacted to protect children from this specific danger and to facilitate the investigation and prosecution of child Internet luring.[23]

28. The stark reality is that *any* child using the Internet is at risk of being sexually exploited at *any* time. One in five youth using the Internet are approached by a sexual predator. High risk youth, including those who have experienced sexual or physical abuse or other trauma, who suffer from depression or behavioral problems, or who feel socially isolated, are particularly vulnerable to online sexual solicitations. At risk youth also frequent Internet chat rooms which attract online sexual predators trolling for child victims.[24]

29. It is important to keep in mind that s. 172.1 criminalizes conduct that precedes the commission of the substantive sexual offence.[25] The act of intentionally communicating by computer with an underage victim for the purpose of facilitating the commission of a designated sexual offence constitutes the gravamen of the crime.[26]

30. Facilitating does not require the use of sexually explicit language. The grooming process used by online sexual predators may begin with the predator befriending the child victim and discussing innocuous topics to reduce the victim's inhibitions before the predator reveals his sexual motive. These types of communications are no less criminal or less harmful to the extent that they help bring about, make easier or more probable the commission of a specified secondary offence.[27]

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[20] *R. v. Pengelley*, [2009] O.J. No. 1682 (S.C.J.) ("*Pengelley*") at paras. 80-81 citing M. Megan McCune, "Virtual Lollipops and Lost Puppies: How Far Can States Go to Protect Minors Through the Use of Internet Luring Laws", 14 *CommLaw Conspectus* 503 (2006) ("McCune") at p. 505.

[21] *Legare* at para. 1.

[22] *K.R.J.* at para. 113.

[23] *Legare* at para. 26; and *Levigne* at para. 24.

[24] McCune at pp. 508-510; and Janis Wolak et al., "Online 'Predators' and Their Victims: Myths, Realities, and Implications for Prevention and Treatment", 63(2) *American Psychologist* 111 (February-March 2008) ("Wolak") at p. 117 and p. 123.

[25] *Legare* at para. 25.

[26] *Ibid.* at para. 28.

[27] *Legare* at paras. 28-31.

31. Child Internet luring causes significant harms. This conduct has a detrimental impact on the sexual development of child victims and impedes their ability to develop healthy romantic relationships. It can also impair a victim's cognitive, physical and academic development. Self-harming, suicidal thoughts, eating disorders and low self-esteem all can result from child luring. Victims are also at an increased risk of becoming sexual abusers themselves as adults.[28]

32. The harms associated with child Internet luring are capable of being just as serious as those caused by direct physical sexual abuse.[29] As has been noted, the "Internet has made it possible to get into the victim's head and abuse remotely…through manipulation and control over time by an adult abuser, the child victim becomes a participant in her own sexual abuse."[30]

33. There is also a direct link between the sexual grooming of children over the Internet and the commission of other sexual offences against children. There is a high incidence of the possession of child pornography related to child Internet luring.[31] It is also not uncommon for an accused charged with child Internet luring to be charged with related sexual offences such as invitation to sexual touching and child pornography charges.[32]

34. Fulfillment of Canada's international obligations requires protecting children from harm. The *Convention on the Rights of the Child*[33] obliges Canada to institute measures that protect children from sexual exploitation and to investigate and prosecute this conduct.[34]

35. Section 172.1(3) provides law enforcement with a "sword" in identifying and apprehending online sexual predators "because it permits investigators, posing as children, to cast their lines in Internet chat rooms, where lurking predators can be expected to take the bait."[35] The objective of

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[28] *R. v. Rafiq*, 2015 ONCA 768 ("*Rafiq*") at paras. 42-45; Wolak at pp. 115-116; and Donica Tan Li Hui et al., "Understanding the Behavioural Aspects of Cyber Sexual Grooming: Implications for Law Enforcement", 17 *Int'l J. Police Sci. & Mgmt.* 40 (2015) ("Hui") at p. 41 and p. 43.

[29] *Ibid*. *Rafiq*.

[30] *Ibid*. at para. 44.

[31] Wolak at p. 119.

[32] See for example *R. v. Miller*, 2011 ABPC 354; and *R. v. Groves*, 2015 ONSC 2590.

[33] Can. T.S. 1992 No. 3.

[34] *Ibid*. Article 34. Other international instruments impose similar obligations on Canada to take measures for the protection of children. See *Sharpe* at para. 178.

[35] *Levigne* at para. 25.

s. 172.1(3) is "to close the cyberspace door before the predator gets in to prey."[36] In other words, the overarching goal of the legislation is to *prevent* harm to real child victims *before* it occurs.

36. Child Internet luring "is a form of crime which is not easily detected or prevented by traditional police investigative techniques, which are principally reactive in nature."[37] Despite the pervasiveness of child Internet luring, relatively few incidents are reported to authorities and the vast majority of cases go uninvestigated.[38] As the Respondent acknowledges, there are unique challenges to Internet crime.[39] Law enforcement face a myriad of difficulties in investigating this type of criminal activity.[40] As a result, s. 172.1(3) is by necessity proactive and preventive.

(ii) Section 172.1(3) is Rationally Connected to its Objectives

37. The presumption of belief in s. 172.1(3) is only triggered in a narrow set of circumstances, namely, where the interlocutor or real child victim is represented as underage where there is no evidence that the accused did not believe that the interlocutor or victim was underage.[41] If there is evidence to the contrary, including evidence that the accused took steps to ascertain the age of the interlocutor or victim, then s. 172.1(3) is not available and the analysis shifts to s. 172.1(4).

38. Section 172.1(3) is rationally connected to the objectives of protecting children from online sexual exploitation and facilitating the investigation and prosecution of child Internet luring. It allows the Crown to rely on the age representation by an interlocutor or real child victim as evidence that an accused believed that the interlocutor or victim was underage where the only evidence on belief of age is the representation.[42]

(iii) Section 172.1(3) is Minimally Impairing of Section 11(d)

39. The Court of Appeal concluded that s. 172.1(3) is not minimally impairing because the objectives of the legislation can be accomplished without it. The Court asserted that law enforcement will have the opportunity to generate a record over the course of an undercover operation that will permit the trier of fact to infer that an accused believed that the interlocutor was

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[36] *Legare* at para. 25.

[37] *R. v. Sargent*, 2010 ABPC 285 at para. 18.

[38] Hui at p. 41; and Jennifer Loughlin and Andrea Taylor-Butts, *Child luring through the internet* (Statistics Canada, March 12, 2009).

[39] Respondent's Factum at para. 1.

[40] *Ibid*. Hui at p. 41 and p. 46.

[41] AR, Vol. 1, Tab 4 at p. 66, Reasons for Judgment of the Court of Appeal at para. 58.

[42] *Levigne* at para. 34; and AR, Vol. 1, Tab 4 at p. 71, Reasons for Judgment of the Court of Appeal at para. 70.

underage making it unnecessary to resort to s. 172.1(3).[43] The Court further reasoned that this same record may disclose evidence to the contrary, including evidence that the accused did not believe that the interlocutor was underage or evidence indicating that the accused took steps to ascertain the interlocutor's age, and in either of these cases s. 172.1(3) is not available.[44]

40. In short, the Court of Appeal concluded that resort to the presumption of belief is either unnecessary or unavailable in the context of undercover operations such that the offence of child Internet luring can be successfully investigated and prosecuted in the absence of the presumption of belief provision. The Court's reasoning effectively treats s. 172.1(3) as nugatory in terms of its purpose and effect.

41. The Court of Appeal held that s. 172.1(3) is not minimally impairing because a prosecution could be viable in the absence of the provision. However, the question it was obliged to ask was whether "the limit on the right is reasonably tailored to the [pressing and substantive] objective"[45] or "whether there are less harmful means of achieving the legislative goal."[46]

42. This branch of the inquiry does not require the government to adopt the least impairing measure, but rather one that falls within a range of reasonable alternatives.[47] In undertaking this assessment, "the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives."[48]

43. The Court of Appeal did not turn its mind to whether there are a range of less intrusive reasonable alternatives to s. 172.1(3) because of its conclusion that s. 172.1(3) is essentially superfluous. This conclusion is predicated upon an erroneous understanding of the offence of child Internet luring and the ability of law enforcement to combat this offence. It also fails to take into account a critical aspect of the objectives underlying s. 172.1(3) of enabling law enforcement to be preventive in stopping online sexual predators *before* they harm children.

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[43] AR, Vol. 1, Tab 4 at p. 72, Reasons for Judgment of the Court of Appeal at para. 72.

[44] AR, Vol. 1, Tab 4 at pp. 72-73, Reasons for Judgment of the Court of Appeal at para. 73.

[45] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, 2015 SCC 5 (*"Carter"*) at para. 102.

[46] *Hutterian* at para. 53.

[47] *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3, 2015 SCC 1 at para. 149.

[48] *Hutterian* at para. 53. See also *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 999.

44. The Court of Appeal's conclusion on minimal impairment rests on two false premises. First, the Court wrongly assumed that, in every undercover operation, the police will have the ability to amass a compelling evidentiary record on the issue of belief of age which will render resort to s. 172.1(3) either unnecessary or unavailable. Second, the Court failed to realize that the presumption of belief also applies to cases where the person making the representation is a real child victim.

45. Child Internet luring is unique. As has been noted:

> …cyber sexual grooming…happens faster with swifter results, compared with the traditional form of grooming. The electronic medium is easy to use and can be wielded as a tool at minimum cost and maximum stealth. Perpetrators are also not constrained by issues of time or victim accessibility as they would usually face, and are able to reach countless children at great geographical distances simultaneously. Compounding the issue, victims may behave differently from how they would in reality, because of the real or perceived freedom online.[49]

46. Section 172.1(3) is aimed at responding to an offence that occurs in a "rapid" manner.[50] The offence can be made out based on a *single* communication of a *brief* duration.[51] The number of communications can be an aggravating factor on sentencing[52], but a multiplicity of communications or communications with the qualitative dimensions envisaged by the Court of Appeal[53] are not required, nor are they necessarily the norm.

47. The length of a child Internet luring investigation is unpredictable and circumstances will differ from case to case.[54] For example, in *Legare*, the accused engaged in two Internet chat room conversations of a sexually explicit nature with the 12 year old female victim on the same day. In contrast, in *Levigne*, the accused engaged in a series of sex-infused Internet chats over a period of weeks with an undercover police officer who represented himself to be a 13 year old boy.

48. Besides demonstrating the highly variable nature of child Internet luring cases, *Legare* and *Levigne* illustrate that the presumption of belief can operate either where a real child victim makes the representation of age or where the representation is made by an undercover police officer. Early intervention by law enforcement is even more imperative where the victim is an actual child, as the

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[49] Hui at p. 41.

[50] *Alicandro* at para. 36 as cited in *Legare* at para. 26

[51] *R. v. MacIntyre*, 2009 ABPC 177 at para. 94.

[52] *R. v. Woodward* (2011), 107 O.R. (3d) 81 (C.A.), 2011 ONCA 610 at para. 47.

[53] AR, Vol. 1, Tab 4 at p. 72, Reasons for Judgment of the Court of Appeal at para. 72.

[54] *R. v. Kalanj*, [1989] 1 S.C.R. 1594 at p. 1609.

harm occurring is real and continuing. Undercover operations can and should conclude with the arrest of the accused after just a few conversations taking place over a very short period of time.[55]

49. The Court of Appeal's characterization of a child Internet luring investigation does not accord with the realities of this type of offence.

50. It is not invariably the case that the communications will only gradually evolve to be sexual in nature to permit for a prolonged investigation and the creation of a robust record. Online communications can quickly escalate into sexually explicit conversations.[56]

51. The Internet offers sexual predators instantaneous access to millions of children at any given time.[57] Given the social media platforms often used, it is not uncommon for the sexual predator to be communicating with several child victims simultaneously.[58] Successful undercover operations also demonstrate that an accused can communicate with an undercover police officer posing as a child as well as with multiple real child victims during the same timeframe.[59]

52. Section 172.1(3) targets a specific type of offender. It "was adopted by Parliament to identify and apprehend predatory adults who, generally for illicit sexual purposes, troll the Internet to attract and entice vulnerable children and adolescents."[60] This conduct involves an online predator cloaked in anonymity pursuing their nefarious intentions by seeking out child victims where the predator's true identity is masked to their prey.[61] The Internet serves as a "hunting ground" for sexual predators whose singular intention is to groom children for sexual activity.[62] While some of these intended victims may be police officers posing as children, most will be real child victims.

53. If an undercover officer balks at fully engaging with an online sexual predator for the purpose of extending the investigation, then police run the risk of the predator sexually soliciting real

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[55] See for example *R. v. Ghotra*, 2016 ONSC 5675 at para. 1.

[56] See for example *R. v. R.Y.*, 2013 BCPC 0421 at para. 4; *R. v. Shepherdson*, 2012 ABPC 51 at para. 9; and *R. v. McCall*, 2011 BCPC 7 at para. 19.

[57] Elizabeth D. Tempio, "A/S/L 45/John Doe Offender/Federal Prison – The Third Circuit Takes a Hard Line against Child Predators in *United States v. Tykarsky*", 52 *Vill. L. Rev.* 1071 (2007) ("Tempio") at p. 1075.

[58] See for example *R. v. McLean*, 2015 SKPC 121 at para. 3; and *Pengelley* at para. 15.

[59] See for example *R. v. Armstrong*, 2009 ABPC 45 in which the accused communicated with an undercover police officer posing as a 13 year old girl in addition to more than 100 real young girls over a 7 day period using a variety of social networking sites.

[60] *Levigne* at para. 24.

[61] *Ibid.* at para. 25.

[62] *R. v. Harris*, 2017 ONSC 940 ("*Harris*") at para. 1.

child victims or even meeting up with and committing sexual offences against these victims. If this were to happen, the preventive objective of the legislation would be defeated and the police investigation would exacerbate the harm occasioned by the offence.[63] The paradox in this situation is that rather than closing the cyberspace door to online sexual predators, the undercover operation would keep the door open.[64] Instead of identifying and apprehending predatory adults at the first opportunity, police would delay arrests to permit the creation of a fulsome record to the detriment of the interests of real child victims.[65]

54. In the present case, the Respondent sexualized his communications with the undercover officer during their first exchange[66] and the child Internet luring offence was made out very early on in the communications.[67] However, the sexual communications continued over an 80 day period.[68] The Respondent may have been communicating with real child victims during this time. Moreover, had the Respondent been communicating with a child instead of a police officer, the harm would have been real and continuing as the communications are harmful in and of themselves.[69]

55. The Court of Appeal's reasoning erroneously assumes that the undercover officer has control over the sexual predator and will be able to dictate the content and pace of the communications. Yet, it is the predator who is in a position of control.[70] It is wishful thinking to assume that a police officer will be able to turn the tables and control and manipulate the sexual predator in order to ensure a compelling record on the issue of belief of age.

56. The Court of Appeal's reasoning also wrongly presupposes that the record will contain evidence suggesting that an accused did not believe that the undercover police officer or real child victim was underage or evidence indicating that the accused took steps to ascertain the person's age.[71] While this may be true in some cases, in other cases the record will not contain either of these types of evidence given the rapid, highly variable, and unpredictable nature of child Internet luring.

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[63] *Legare* at para. 25.

[64] *Ibid*. *Legare*.

[65] *Levigne* at para. 24.

[66] AR, Vol. III, Tab 11 at pp. 15-16, Exhibit 2: Exhibit Book.

[67] AR, Vol. III, Tab 11 at pp. 15-51, Exhibit 2: Exhibit Book.

[68] AR, Vol. I, Tab 8 at p. 113, Information dated May 23, 2013.

[69] *Harris* at para. 1.

[70] *Sharpe* at para. 170.

[71] AR, Vol. 1, Tab 4 at pp. 72-73, Reasons for Judgment of the Court of Appeal at para. 73.

57. Section 172.1(3) is intended to capture factual scenarios not caught by the Court of Appeal's reasoning where the only evidence on belief of age is the representation made to an accused by the target of their communications that he or she is underage, including investigations involving real child victims, where police need to intervene quickly to protect children from harm. Any alternative to s. 172.1(3) would not be effective in achieving the legislative objectives of the provision.[72]

(iv) The Negative Impacts of Any Limitation on Section 11(d) are Proportionate to the Benefits of Section 172.1(3)

58. This aspect of the proportionality analysis involves "a balancing of societal and individual interests."[73] The question at this stage is "whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*."[74] In performing this balancing, the Court must "weig[h] the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good."[75]

59. The Court of Appeal concluded that s. 172.1(3) fails the proportionality analysis for essentially the same flawed reasons found in its minimal impairment analysis.[76]

60. The Court did not engage in any balancing of the effects of s. 172.1(3). Instead, because in its view the record in an undercover operation will render resort to the presumption of belief provision either unnecessary or unavailable, the Court characterized s. 172.1(3) as producing no practical benefits. This meant that s. 172.1(3) could only be seen as producing one kind of practical effect - a deleterious impact on the s. 11(d) rights of an accused.

61. For the reasons explained above, there will be child Internet luring investigations that will not generate a record on the issue of belief of age beyond the representation to an accused that the interlocutor or real child victim was underage making resort to s. 172.1(3) necessary and available.

62. In this situation, the Crown will be entitled to rely on the presumption of belief and s. 172.1(3) will produce salutary effects by protecting children from online sexual exploitation and facilitating the investigation and prosecution of this conduct.[77] These salutary effects will go the greatest distance towards achieving the legislative objectives if child Internet luring investigations

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[72] *Hutterian* at para. 55.

[73] *R. v. Downey*, [1992] 2 S.C.R. 10 ("*Downey*") at p. 38.

[74] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 125.

[75] *K.R.J.* at para. 77 citing *Carter* at para. 122.

[76] AR, Vol. 1, Tab 4 at pp. 72-73, Reasons for Judgment of the Court of Appeal at paras. 71-74.

[77] *Levigne* at para. 30.

are successful in identifying and apprehending online sexual predators quickly and close the cyberspace door before the predators harm or further harm actual children.[78]

63. For this to happen, law enforcement should be able to arrest an accused as soon as the elements of the child Internet luring offence are made out. The presumption of belief provision makes this goal possible.

64. Accordingly, contrary to the view of the Court of Appeal, s. 172.1(3) is capable of having salutary effects. The remaining question is whether any deleterious effects outweigh these salutary effects, a balancing that the Court below did not perform as a result of its flawed analysis. Two important considerations inform this balancing process and support the conclusion that the effects of s. 172.1(3) are proportionate to its objectives.

65. First, at this final stage of the s. 1 analysis, the seriousness of any s. 11(d) infringement must be examined.[79] Thus, some limits on s. 11(d) will be easier to justify than others.[80] On the one hand, there will be violations of s. 11(d) that will fail the proportionality test because they represent excessive invasions of the presumption of innocence.[81] On the other hand, there will be violations that will be relatively minor in nature and will be justifiable under s. 1 where the legislative objective is fundamentally important.[82] Any infringement of s. 11(d) by operation of s. 172.1(3) falls into the latter category.[83]

66. Second, a relevant factor in determining whether a statutory presumption that infringes s. 11(d) can be justified are the means available to an accused to rebut the presumption, including whether it is possible, and how easy it is for the accused to do so.[84] The presumption of belief in s. 172.1(3) is rebuttable and the ability of an accused to rebut the presumption is not onerous.

67. Not only is the presumption easily rebuttable, but several other factors point to the minimal nature of any infringement:

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[78] *Legare* at para. 25.

[79] *Oakes* at pp. 139-140.

[80] *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33 at para. 10; and *Hutterian* at para. 87.

[81] *R. v. Laba*, [1994] 3 S.C.R. 965 at p. 1011.

[82] *Downey* at pp. 38-39.

[83] *Hutterian* at para. 102.

[84] *R. v. St-Onge Lamoureux*, [2012] 3 S.C.R. 187, 2012 SCC 57 at paras. 30-31.

(a) The presumption imposes an evidential burden rather than a persuasive burden on an accused.

(b) The presumption is only engaged in a narrow set of circumstances, namely, where the evidentiary record on the issue of belief age is limited to a representation to an accused that the interlocutor or real child victim was underage.

(c) Where the record discloses any evidence suggesting that an accused did not believe that the interlocutor or victim was underage, or if there is some evidence that the accused took steps to ascertain the person's age, the presumption is not available.

(d) An accused need only point to a single piece of evidence to the contrary suggesting that the accused did not believe that the person was underage or took steps to ascertain the person's age, which could come from the record or could be achieved as a result of cross-examination of Crown witnesses.

(e) The element of the offence that an accused was communicating with a person whom the accused believed to be underage must still be established by the Crown beyond a reasonable doubt.[85]

68. Section 172.1(3) strikes an appropriate balance between two competing extremes. At one end of the spectrum is the complete elimination of the presumption of belief. This outcome would diminish the protection of children from online sexual exploitation. At the other end of the spectrum would be a reverse onus provision that would impose a more onerous burden on an accused and constitute a more serious infringement of s. 11(d). Parliament has chosen a reasonable middle ground that avoids both of these extremes.[86]

D. The Reasonable Steps Requirement Does Not Violate Section 7 of the *Charter*

69. Section 172.1(4) limits the availability of the defence of mistaken belief in age to situations where an accused took reasonable steps to ascertain the person's age. Parliament enacted this provision "to foreclose exculpatory claims of ignorance or mistake that are entirely devoid of an objective evidentiary basis."[87] The effect of s. 172.1(4) is that an accused's belief that an interlocutor

[85] *Levigne* at para. 17, para. 30 and para. 32; and *Legare* at paras. 36-37.

[86] *Downey* at pp. 37-38.

[87] *Levigne* at para. 31.

or real child victim was not underage will afford a defence to a charge of child Internet luring provided the accused took reasonable steps to ascertain the person's age.[88]

70. As was explained to the Standing Senate Committee on Legal and Constitutional Affairs when s. 172.1(4) was introduced, "if you communicate with somebody for a purpose you cannot do it accidentally or by chance. You must know what you are doing….It would be a defence if the person has taken reasonable steps to ascertain the age of the child. It is not a defence if you are willfully blind and you do not want to know."[89]

71. Section 172.1(4) does impose a legal obligation on an accused.[90] However, the nature of this obligation must be contextualized for the purposes of s. 7. Section 172.1(4) is put into play where an accused intentionally communicates with another person by computer for a sexual purpose in circumstances where there is reason to believe that the other person is underage, including because the person has represented herself as underage, and the accused claims that he did not believe the person to be underage.[91]

72. The reasonable steps requirement is carefully tailored to the environment in which the offending conduct occurs – in cyberspace where anonymity and secrecy make it all the more necessary for adults who wish to take advantage of these features of the Internet to engage in sexual communications with others to take reasonable steps to ensure that they are not harming children.

73. The nature of the reasonable steps requirement must also be analyzed in the precise factual matrix in which it arises: in circumstances where an adult is engaging in sexualized communications which would be harmful to children and there is reason to believe that the adult is communicating with a child, including because the target of their communications has represented herself to be a child. All that s. 172.1(4) demands is that in this situation the adult take reasonable steps to ascertain the target's age to ensure that he is not harming a child.

74. For adults who wish to carry out sexual fantasies online with another adult posing as a child, very little is required. If the defence is that an accused never believed that he was communicating with a child, reasonable steps only require the accused to confirm during the communications that the

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[88] *Ibid*. at para. 36.

[89] Canada. Standing Senate Committee on Legal and Constitutional Affairs. *Minutes of Proceedings and Evidence on Bill C-15A to amend the Criminal Code and to amend other Acts*, Ottawa, No. 22, December 12, 2001.

[90] *Levigne* at para. 38.

[91] *Ibid*. at paras. 40-41.

purported child was only pretending to be a child and was in fact an adult. Or the accused might be able to point to other evidence to the contrary indicating that he did not really believe the other person to be a child. For example, in the United States, the fantasy or role-playing defence has tended to succeed where the communications occurred in adults-only chat rooms as opposed to chat rooms frequented by young persons.[92]

75. The Court of Appeal correctly concluded that the reasonable steps requirement in s. 172.1(4) does not violate the principles of fundamental justice under s. 7. As found by the Court below, s. 172.1(4) does not offend s. 7 for the same reasons that the Ontario Court of Appeal in *R. v. Darrach*[93] found that s. 273.2(b) of the *Code*, which imposes a reasonable steps requirement as part of the defence of belief in consent to a charge of sexual assault, does not violate s. 7.

76. First, although child Internet luring rightfully carries a high degree of stigma and moral blameworthiness for an accused[94], the high stigma attached to the offence does not place it in the same category reserved for those "very few" offences like murder for which s. 7 requires that the *mens rea* component be assessed against a purely subjective standard.[95]

77. Second, while the reasonable steps requirement introduces an objective component to the offence, this requirement operates as a modified objective standard which retains a subjective dimension insofar as the reasonableness of the steps is to be assessed in the circumstances known to the accused.[96]

78. While s. 172.1(4) does not contain the explicit language "in the circumstances known to the accused at the time" which appear in s. 273.2(b), it is consistent with other *Criminal Code* provisions. For example, the age of consent provisions in s. 150.1 impose a reasonable steps requirement but do not contain this language. However, like s. 172.1(4), the reasonable steps requirement in s. 150.1(4) has been interpreted as including both an objective and a subjective component with the question being "what steps would have been reasonable <u>for the accused to take in the circumstances</u>." [Emphasis added.][97]

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[92] Tempio at pp. 1090-1091.

[93] *R. v. Darrach*, (1998), 122 C.C.C. (3d) 225 (Ont. C.A.), appeal dismissed, [2000] 2 S.C.R. 443, 2000 SCC 46.

[94] AR, Vol. 1, Tab 4 at pp. 82-83 Reasons for Judgment of the Court of Appeal at paras. 92-93.

[95] AR, Vol. 1, Tab 4 at p. 83, Reasons for Judgment of the Court of Appeal at para. 94.

[96] AR, Vol. 1, Tab 4 at pp. 86-88, Reasons for Judgment of the Court of Appeal at paras. 99-101.

[97] *R. v. P. (L.T.)* (1997), 113 C.C.C. (3d) 42 (B.C.C.A.) at para. 20.

79. The presumption of constitutionality also militates against s. 172.1(4) being contrary to s. 7 based only on this difference in statutory language and rebuts any suggestion that "reasonable steps" in s. 172.1(4) should be interpreted differently from "reasonable steps" in s. 273.2(b) based on the absence of "in the circumstances known to the accused at the time" in s. 172.1(4).[98]

80. This Court has already interpreted s. 172.1(4) in exactly this way. In *Levigne*, the Court stated that "[o]bjectively considered, the steps taken must be reasonable in the circumstances." [Emphasis added.][99] The modified objective standard is not an elusive legal concept. It simply requires a consideration of what the reasonable adult Internet user in the circumstances of the accused would have done in the same situation.[100]

81. Third, an accused who persists in communicating with a person for a sexual purpose where there is reason to believe that the person is underage, particularly where the person has represented this to be the case, cannot be said to be morally innocent.[101] With s. 172.1(4), Parliament has legislated that the nature of the Internet and the seriousness of the offence of child Internet luring do not permit an accused to be wilfully blind.

82. Were it otherwise, it would be too easy for an accused to escape liability by simply asserting that he was not intending to engage in sexual communications with a child but rather with an adult where the target of the communications represented herself as underage and the accused did not take reasonable steps to ascertain the target's age in the face of this representation.

E. Any Infringement of s. 7 is a Reasonable Limit on the Principles of Fundamental Justice

83. In the alternative, the reasonable steps requirement in s. 172.1(4) is a reasonable limit on the s. 7 rights of an accused.

84. The reasonable steps requirement responds to the same pressing and substantial objectives identified above in relation to s. 172.1(3). Section 172.1(4) is rationally connected to these objectives as it is aimed at preventing the online sexual exploitation of children by requiring adults to take reasonable steps to ensure that they are not engaging in sexual communications with a child.

85. Section 172.1(4) is minimally impairing as it only catches a discrete category of individuals. It forecloses the availability of the defence of mistaken belief in age to those accused who persist in

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[98] *Sharpe* at para. 33.

[99] *Levigne* at para. 32.

[100] *Arndt v. Smith*, [1997] 2 S.C.R. 539 at para. 7.

[101] AR, Vol. 1, Tab 4 at pp. 87-88, Reasons for Judgment of the Court of Appeal at para. 101.

communicating for a sexual purpose with a person who has represented to the accused that he or she is underage where the accused did not take reasonable steps to ascertain the person's age.

86. The provision does not eliminate the defence of mistaken belief altogether, nor does it require an accused in this situation to take all reasonable steps, only reasonable steps viewed objectively in the circumstances.[102] As such, s. 172.1(4) only excludes claims of ignorance or mistake that lack an evidentiary basis[103] when assessed against a modified objective standard.

87. This Court in *Carter* recognized that the greater public good may justify depriving an individual of life, liberty or security of the person under s. 1, particularly where the competing societal interests are themselves protected under s. 7. The Court stated that in this context a restriction on s. 7 rights may be proportionate to the legislative objective resulting in the infringement.[104] That is this case.

88. It is not only the s. 7 *Charter* interests of an accused that are implicated by s. 172.1(4). The reasonable steps requirement protects children from sexual exploitation by adults. In this way, the provision advances the s. 7 security interests of children by safeguarding them from the physical and psychological harms caused by child Internet luring.[105] The protection of children from harm is a basic tenet of our legal system for the purposes of s. 7.[106]

89. The security interests of a child at risk of being sexually exploited by an online sexual predator are closer to the core of the values protected by s. 7 than the interests of an adult who chooses not to take reasonable steps to prevent harm to children in pursing their own sexual gratification over the Internet.[107] The state has a legitimate interest in this situation to protect children as a vulnerable group from harm.[108]

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[102] *Levigne* at para. 32.

[103] *Ibid.* at para. 31.

[104] *Carter* at para. 95.

[105] *Sharpe* at para. 140, paras. 189-190 and para. 213 *per* L'Heureux-Dubé, Gonthier and Bastarache JJ.

[106] *B. (R.)* at para. 88 *per* La Forest J. cited in *A.C.* at para. 104.

[107] *R. v. Godoy*, [1999] 1 S.C.R. 311 at para. 19. See also *R. v. Tse*, [2012] 1 S.C.R. 531, 2012 SCC 16 at para. 21.

[108] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 572, 2003 SCC 74 at para. 132.

90. It is the responsibility of every adult to protect children from harm. This obligation is widely reflected in Canada's domestic laws and forms part of our international obligations.[109] The best interests of the child is itself a recognized legal principle.[110]

91. Section 172.1(4) is not unique in imposing a legal obligation on adults where children are concerned. While there is no general duty imposed on adults to report a crime or to save another from harm, all of Canada's ten provinces and two of its territories place some sort of positive duty on adults to report to child protection authorities where a child may be in need of protection.[111] The *Criminal Code* also contains similar reasonable steps provisions in the context of sexual offences, including those targeting children.[112]

92. Section 172.1(4) attempts to fill a gap in child protection created by the Internet. It comes down to a very straightforward question – who as between an adult trolling the Internet for their own sexual gratification and a child using the Internet for innocent purposes should be assigned a basic level of responsibility for taking reasonable steps to prevent harm to the child at the hands of the adult. The answer is plain and obvious. As this Court stated in *Downey*, "[i]t would be unfortunate if the *Charter* were used to deprive a vulnerable segment of society of a measure of protection."[113]

PART IV – COSTS

93. The Attorney General of Canada does not seek costs and submits that the ordinary rule that costs are not awarded against interveners should apply.

PART V – ORDER SOUGHT

94. The Attorney General of Canada asks that the appeal be disposed of in accordance with the foregoing submissions. By order of this Court dated April 9, 2018, the Attorney General of Canada has been granted permission to make 5 minutes of oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, in the Province of Ontario, this 9th day of May, 2018.

Jeffrey G. Johnston, of Counsel for the Intervener, Attorney General of Canada

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[109] *Sharpe* at paras. 170-174 *per* L'Heureux-Dubé, Gonthier and Bastarache JJ.

[110] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 at para. 7.

[111] Ronda Bressner, "The Duty to Report Child Abuse" (1999), 17 *C.F.L.Q.* 277.

[112] See ss. 150.1(4)-(6) (age of consent); s. 163.1(5) (child pornography); s. 171.1(4) (making sexually explicit material available to a child); and s. 273.2(b) (sexual assault).

[113] *Downey* at p. 39.

PART VI – LIST OF AUTHORITIES

PART VII – STATUTES AND REGULATIONS

Criminal Code, R.S.C. 1985, c. C-46, s. 172.1

172.1 (1) Every person commits an offence who, by a means of telecommunication, communicates with

(a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person under subsection 153(1), section 155, 163.1, 170, 171 or 279.011 or subsection 279.02(2), 279.03(2), 286.1(2), 286.2(2) or 286.3(2);

(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person; or

(c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under section 281 with respect to that person.

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

(3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed

Code criminel, L.R.C. 1985, ch. C-46, s. 172.1

172.1 (1) Commet une infraction quiconque communique par un moyen de télécommunication avec :

a) une personne âgée de moins de dix-huit ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée au paragraphe 153(1), aux articles 155, 163.1, 170, 171 ou 279.011 ou aux paragraphes 279.02(2), 279.03(2), 286.1(2), 286.2(2) ou 286.3(2);

b) une personne âgée de moins de seize ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée aux articles 151 ou 152, aux paragraphes 160(3) ou 173(2) ou aux articles 271, 272, 273 ou 280;

c) une personne âgée de moins de quatorze ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée à l'article 281.

(2) Quiconque commet l'infraction visée au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de quatorze ans, la peine minimale étant de un an;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de deux ans moins un jour, la peine minimale étant de six mois.

(3) La preuve que la personne visée aux alinéas (1)a), b) ou c) a été présentée à l'accusé comme ayant moins de dix-huit, seize ou quatorze ans, selon le cas, constitue, sauf preuve contraire, la preuve que l'accusé la croyait telle.

(4) Le fait pour l'accusé de croire que la personne visée aux alinéas (1)a), b) ou c) était âgée d'au moins dix-huit, seize ou quatorze ans, selon le cas, ne constitue un moyen de défense contre une accusation fondée sur le paragraphe (1) que s'il a pris des mesures raisonnables pour s'assurer de l'âge de la

that the person was under that age.

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

personne.

***Criminal Code*, R.S.C. 1985, c. C-46, ss. 150.1(4)-(6), 163.1(5), 171.1(4) and 273.2(b)**

***Code criminel*, L.R.C. 1985, ch. C-46, ss. 150.1(4)-(6), 163.1(5), 171.1(4) and 273.2(b)**

150.1(4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

(5) It is not a defence to a charge under section 153, 159, 170, 171 or 172 or subsection 286.1(2), 286.2(2) or 286.3(2) that the accused believed that the complainant was eighteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

(6) An accused cannot raise a mistaken belief in the age of the complainant in order to invoke a defence under subsection (2) or (2.1) unless the accused took all reasonable steps to ascertain the age of the complainant.

150.1(4) Le fait que l'accusé croyait que le plaignant était âgé de seize ans au moins au moment de la perpétration de l'infraction reprochée ne constitue un moyen de défense contre une accusation portée en vertu des articles 151 ou 152, des paragraphes 160(3) ou 173(2) ou des articles 271, 272 ou 273 que si l'accusé a pris toutes les mesures raisonnables pour s'assurer de l'âge du plaignant.

(5) Le fait que l'accusé croyait que le plaignant était âgé de dix-huit ans au moins au moment de la perpétration de l'infraction reprochée ne constitue un moyen de défense contre une accusation portée en vertu des articles 153, 159, 170, 171 ou 172 ou des paragraphes 286.1(2), 286.2(2) ou 286.3(2) que si l'accusé a pris toutes les mesures raisonnables pour s'assurer de l'âge du plaignant.

(6) L'accusé ne peut invoquer l'erreur sur l'âge du plaignant pour se prévaloir de la défense prévue aux paragraphes (2) ou (2.1) que s'il a pris toutes les mesures raisonnables pour s'assurer de l'âge de celui-ci.

163.1(5) It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where

163.1(5) Le fait pour l'accusé de croire qu'une personne figurant dans une représentation qui constituerait de la pornographie juvénile était âgée d'au moins dix-huit ans ou était présentée comme telle ne constitue un moyen de défense contre une accusation portée sous le régime du paragraphe (2) que s'il a pris toutes les mesures raisonnables, d'une part, pour s'assurer qu'elle avait bien cet âge et, d'autre part, pour veiller à

the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

171.1(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least 18, 16 or 14 years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

…

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

***Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Article 34**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

ce qu'elle ne soit pas présentée comme une personne de moins de dix-huit ans.

171.1(4) Le fait pour l'accusé de croire que la personne visée aux alinéas (1)a), b) ou c) était âgée d'au moins dix-huit, seize ou quatorze ans, selon le cas, ne constitue un moyen de défense contre une accusation fondée sur l'alinéa applicable que s'il a pris des mesures raisonnables pour s'assurer de l'âge de la personne.

273.2 Ne constitue pas un moyen de défense contre une accusation fondée sur les articles 271, 272 ou 273 le fait que l'accusé croyait que le plaignant avait consenti à l'activité à l'origine de l'accusation lorsque, selon le cas :

…

b) il n'a pas pris les mesures raisonnables, dans les circonstances dont il avait alors connaissance, pour s'assurer du consentement.

***Convention relative aux droits de l'enfant*, R.T.C. 1992 n. 3, article 34**

Les Etats parties s'engagent à protéger l'enfant contre toutes les formes d'exploitation sexuelle et de violence sexuelle. A cette fin, les Etats prennent en particulier toutes les mesures appropriées sur les plans national, bilatéral et multilatéral pour empêcher:

a) Que des enfants ne soient incités ou contraints à se livrer à une activité sexuelle illégale;

b) Que des enfants ne soient exploités à des fins de prostitution ou autres pratiques sexuelles illégales;

c) Que des enfants ne soient exploités aux fins de la production de spectacles ou de matériel de caractère pornographique.