File No. 37687

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent on C61097/
Appellant on C61110)

-and-

DOUGLAS MORRISON

Respondent
(Appellant on C61097/
Respondent on C61110)

-and-

ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF ALBERTA
ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF SASKATCHEWAN

Interveners

FACTUM OF THE ATTORNEY GENERAL OF SASKATCHEWAN INTERVENER

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

Ministry of Justice and the Attorney General for Saskatchewan
300 - 1874 Scarth Street
Regina, SK S4P 4B3
W. Dean Sinclair, Q.C.
Counsel for the Intervenor
Phone: (306) 787-5490
Fax: (306) 787-8878
Email: dean.sinclair@gov.sk.ca

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
D. Lynne Watt
Ottawa Agent for the Intervener
Phone: (613) 232-1781
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Attorney General of Ontario
10th Floor – 720 Bay Street
TORONTO ON M7A 2S9
Andreea Baiasu
Counsel for the Appellant
Her Majesty the Queen
Phone: (416) 326-4600
Fax: (416) 326-4656

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1300
OTTAWA ON K1P 1J9
Nadia Effendi
Ottawa Agent for the Appellant
Phone: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

Rusonik, O'Connor, Robbins, Ross, Gorham & Angelini LLP
36 Lombard Street
TORONTO ON M5C 2X3
Mark C. Halfyard
Salvatore Caramanna
Breana Vandebeek
Counsel for the Respondent
Phone: (416) 598-1811
Fax: (416) 598-3384
Email: halfyard@criminaltriallawyers.com

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
P.O. Box 466, Stn. A
OTTAWA ON K1P 1C3
Matthew Estabrooks
Ottawa Agent for the Respondent
Phone: (613) 786-8695
Fax: (613) 563-9869
Email: matthew.estabrooks@gowlingwlg.com

Attorney General of Canada
2127 – 284 Wellington Street
OTTAWA ON K1A 0H8
Jeffrey G. Johnston
Counsel for the Intervener Attorney General of Canada
Phone: (613) 941-3528
Fax: (613) 957-8412
Email: Jeffrey.johnston@justice.gc.ca

Attorney General of Canada
50 O'Connor Street, Suite 500, Room 557
OTTAWA ON K1A 0H8
Christopher M. Rupar
Ottawa Agent for the Intervener Attorney General of Canada
Phone: (613) 670-6290
Fax: (613) 954-1920
Email: Christopher.rupar@justice.gc.ca

Attorney General of Alberta
Bowker Building, 9833 – 109 Street, 3rd Floor
EDMONTON AB T5K 2E8
Deborah Alford
Counsel for the Intervener Attorney General of Alberta
Phone: (780) 427-5181
Fax: (780) 422-1106
Email: deborah.alford@gov.ab.ca

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
D. Lynne Watt
Ottawa Agent for the Intervener Attorney General of Alberta
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Attorney General of British Columbia
3rd Floor – 940 Blanchard Street
VICTORIA BC V8W 3E6
Lara Vizsolyi
Counsel for the Intervener the Attorney General of British Columbia
Phone: (250) 387-0150
Fax: (250) 387-4262
Email: lara.vizsolyi@gov.bc.ca

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
Robert E. Houston, Q.C.
Ottawa Agent for the Intervener Attorney General of British Columbia
Phone: (613) 783-8817
Fax: (613) 788-3500
Email: robert.houston@gowlingwlg.com

Procureur général du Québec
1200, Route de l'Église, 2ème étage
QUEBEC QC G1V 4M1
Sylvain Leboeuf
Julie Dassylva
Counsel for the Intervener Attorney General of Quebec
Phone: (418) 643-1477 Ext: 21010
Fax: (418) 644-7030
Email: Sylvain.leboeuf@justice.gouv.qc.ca

Noël & Associés
111, rue Champlain
GATINEAU QC J8X 3R1
Pierre Landry
Ottawa Agent for the Intervener Attorney General of Quebec
Phone: (819) 771-7393
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Criminal Lawyers' Association (Ontario)
1100 – 20 Dundas Street, West
TORONTO ON M5G 2G8
Apple Newton-Smith
Daniel Brown
Colleen McKeown
Counsel for the Intervener
Phone: (416) 260-1410
Fax: (416) 800-7331
Email: apple@berkensnewtonsmith.com

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
Matthew Estabrooks
Ottawa Agent for the Intervener
Phone: (613) 786-8695
Fax: (613) 563-9869
Email: matthew.estabrooks@gowlingwlg.com

TABLE OF CONTENTS

PART I

OVERVIEW

1. The Attorney General for Saskatchewan ("Saskatchewan") intervenes to respond to the Constitutional Questions stated by the appellant and respondent in the respective appeal and cross-appeal. The questions concern key provisions of the Internet luring offence that, in Saskatchewan's experience, have proven to be essential in the detection and prosecution of those who use the Internet to facilitate the commission of sexual crimes against vulnerable children and youth.

2. Saskatchewan respectfully disagrees with the Ontario Court of Appeal's conclusion that s. 172.1(3) of the *Criminal Code* infringes s. 11(d) of the *Canadian Charter of Rights and Freedoms* [*Charter*]. The Court's constitutional analysis was flawed by its failure to appreciate that s. 11(d) of the *Charter* does not guarantee a right to an unreasonable acquittal.

3. Saskatchewan respectfully disagrees with the respondent's assertion that s. 172.1(4) infringes s. 7 of the *Charter* in some Internet luring cases. Parliament's decision to impose a requirement that persons take reasonable steps to ascertain they are communicating with other adults when using the Internet to facilitate sexual encounters with people they do not know and likely cannot see is both reasonable and necessary to protect children from online predators.

4. Saskatchewan respectfully disagrees with the Court of Appeal's conclusion that the one-year mandatory minimum in s. 171.1(2)(a) infringes s. 12 of the *Charter*. The Court's conclusion was founded on a mistaken view that the offence of Internet luring is, in some instances, a crime of mere negligence. Further, the prevailing sentencing jurisprudence demonstrates the mandatory minimum sentence is not grossly disproportionate, abhorrent or so intolerable that it outrages standards of community decency.

PART II

CONSTITUTIONAL QUESTIONS IN ISSUE

5. Saskatchewan respectfully submits the rebuttable presumption in s. 172.1(3) of the *Criminal Code* does not infringe s. 11(d) of the *Charter*.

6. Saskatchewan submits s. 172.1(4) does not infringe s. 7 of the *Charter*.

7. Saskatchewan submits the one-year mandatory minimum sentence in s. 172.1(2)(a) does not infringe s. 12 of the *Charter*.

8. In the event the Court does find an infringement in relation to any of the above provisions, Saskatchewan submits that the infringement is justified under s. 1 of the *Charter* for the reasons given by the appellant.

PART III

ARGUMENT

A. Section 172.1(3) does not Infringe s. 11(d) of the *Charter*

9. Saskatchewan respectfully disagrees with the Ontario Court of Appeal' s conclusion that but for the presumption in s. 172.1(3) of the *Criminal Code*, a properly instructed trier of fact could have a reasonable doubt about the guilt of an accused charged with an offence under s. 172.1(1)(b) based solely on telecommunication evidence of this kind:

> Interlocutor: I am 14 years old.
> Accused: Will you have sex with me?

10. With respect, the Court erred by misapplying the principles relating to s. 11(d) of the *Charter*. The Court's conclusion is founded on a distorted conception of the meaning of "proof beyond a reasonable doubt" and was arrived at without necessary reference to basic criminal law principles pertaining to recklessly indifferent and wilfully blind conduct. The presumption in s. 172.1(3) is a necessary and reasonable evidentiary provision that, properly understood, is entirely consistent with the presumption of innocence.

i) The Nature and Purpose of s. 172.1

11. The Internet is a fertile breeding ground for those who are inclined to initiate online or in-person sexual relationships with children and underage youth. The dangers are well known. The inherent power of the Internet enables predators to cast a wide net – a world-wide net – to search for and ensnare potential victims. The Internet gives predators the power to meet, groom and exploit children in ways that would be detected and blocked in the physical world. Offenders reach into homes to anonymously communicate with children without parental knowledge or consent. The pool of potential victims is large and the method of communication is insidious.

R v Alicandro, 2009 ONCA 133, at para 36, 246 CCC (3d) 1;
R v MacLean, 2016 SKCA 93, at paras 28-29, 484 Sask R 137

12. Once contact is made, the Internet provides an ideal platform to groom, exploit and extort sexual favours. Case law is replete with examples of the various types of child sexual exploitation and crimes that can be committed on-line. Offenders may invite children to touch themselves sexually (s. 152 − invitation to sexual touching). Children are often encouraged to send nude pictures or videos of themselves to the offender (s. 163.1− creating or accessing child pornography). Some offenders like to send pictures of their genitals or have children watch as they masturbate (s. 173(2) − exposing genital organs for a sexual purpose to a child). Some go so far as to manipulate children into real-life sexual encounters. Some children are subjected to threats of blackmail and find themselves so deeply ensnared that they cannot see any way out.

See for example: *R v Legare*, 2009 SCC 56, at para 25, 3 SCR 551;
McLean; *Alicandro;* and *R v Woodward*, 2011 ONCA 610, 276 CCC (3d) 86

13. The general purpose of s. 172.1 is clear. It was enacted to protect vulnerable children and young persons from the predations of those who would use the power of the Internet and the anonymity it provides to troll for and attract underage victims for the specific purpose of facilitating the commission of certain offences. At the same time, Parliament deliberately structured the section to enable law enforcement agencies to identify and apprehend offenders by using "sting" operations. The object was to create an offence that would permit law enforcement officers "to close the cyberspace door before the predator gets in to prey".

R v Levigne, 2010 SCC 25, at para 24, 2 SCR 3; *Legare*, at para 25

14. Section 172.1 does not criminalize Internet communications between adults and children. It does not prohibit adults from engaging in sexualized Internet communications with other adults. It does not criminalize "morally innocent" conduct either. Its sole objective is to prevent an accused from using a telecommunication device to communicate with a person who is actually underage, or with a person the accused believes to be underage, for the specific purpose of facilitating one of the listed child exploitation crimes.

Legare, at para 38

15. To protect children from predatory adults and prevent children from being drawn into highly sexualized on-line relationships, Parliament has created what might be considered to be two "rules of engagement" governing the conduct of adults who are interested in pursuing online sexual relationships with others. These rules operate to put the responsibility on adults to police themselves when they participate in "sex infused" telecommunications with people they do not know and likely cannot see. In simple terms, the rules require adults to act like adults, just as they would be expected to do if they were contemplating a real-world sexual relationship with another person.

16. The first rule mandates that any adult who wants to use the Internet to engage in sexualized communications with strangers must exercise due diligence to ascertain the ages of the people with whom he or she is communicating. The rule is expressed in s. 172.1(4) which provides that an accused's belief an online interlocutor is of legal age is not a defence unless the accused took reasonable steps to ascertain that person's age. Due diligence must be exercised whether the accused is communicating with an adult pretending to be a child, a child pretending to be an adult or a child who is not pretending anything at all.

Levigne, at para 36

17. The second rule applies only in cases where there has been an online representation to the accused that the interlocutor is underage. If the "reasonable steps" requirement might be considered as a "proceed with caution" sign on this part on the information superhighway, the rebuttable presumption created by s. 172.1(3) should be considered to be a flashing red light. Its objective is to stop an adult from engaging in any sexualized communication with an online interlocutor who is represented to be a minor until it is safe to do so. It will not be safe to

proceed unless and until the accused has taken reasonable steps to ascertain the other person's true age.

18. In legal terms, s. 172.1(3) creates a mandatory basic fact presumption. It operates such that proof beyond a reasonable doubt that the accused was told the interlocutor was underage is proof the accused believed the interlocutor was underage in the absence of evidence to the contrary. The presumption does not oblige an accused person to prove his innocence or call evidence to avoid its operation. As noted in *Levigne*, the presumption merely facilitates the prosecution of child luring offences while leaving intact the burden on the Crown to prove guilt beyond a reasonable doubt.

Levigne, at para 30

19. Considered together, these rules operate to require an accused who is intent on engaging in sexualized communications over the Internet not to do so with a person who is represented to be underage unless and until the accused has taken reasonable steps to determine the person is of legal age. Thus, even if the presumption in s. 171.2(3) has been rebutted by other evidence, a demonstrated failure to take reasonable steps to ascertain age will be sufficient to secure a conviction.

Levigne, at para 32

20. The Court in *Levigne* made another important observation about the operation of, and the relationship between, s. 172.1(3) and s. 172.1(4). The Court correctly observed that in any case where there has been an online representation the interlocutor is underage followed by evidence the accused took reasonable steps to ascertain whether that representation was false, the reasonable steps evidence will "at once" block the operation of s. 172.1(4) and rebut the presumption in s. 172.1(3).

Levigne, at para 32

21. For reasons developed more fully below, Saskatchewan submits the rules Parliament has enacted to prevent the online sexual exploitation of minors in s. 172.1 are not of a different quality or type than the laws which govern "real world" sexual interactions between adults and minors. In both instances, the responsibility to act lawfully has been put on adults, which is precisely where it belongs.

R v George, 2017 SCC 38, at para 2, 1 SCR 1021

ii) The Legal Test to be Applied in s. 11(d) Cases

22. In a series of cases beginning with *R v Oakes* and extending to the more recent decision in *R v St-Onge Lamoureux*, this Court has consistently applied the same test to determine if a statutory presumption offends s. 11(d) of the *Charter*. The test is simply stated: if the statutory presumption operates so that a conviction may be entered despite a reasonable doubt about guilt, the presumption violates s. 11(d).

> *R v Oakes*, [1986] 1 SCR 103, at pp 132-133; *R v Vaillancourt*, [1987] 2 SCR 636, at pp 655-656; *R v Whyte*, [1988] 2 SCR 3, at p 18; *R v Downey*, [1992] 2 SCR 10, at p 21; and *R v St-Onge Lamoureux*, 2012 SCC 57, at para 24, 3 SCR 187

23. This test has been applied to statutory presumptions which impose a persuasive burden of proof on an accused (see *Oakes* and *Whyte*). It has been applied to statutory presumptions which merely impose an evidential burden on the accused (see *Downey* and *St-Onge Lamoureux*). It is also applied even if the statutory presumption does not directly relate to an essential element of the offence (see *Whyte*).

24. The test to be applied is clear. So too is the principle that the constitutionality of statutory presumptions is not to be judged on the basis of whether they permit unreasonable acquittals. As stated in *Vaillancourt*:

> Finally, the legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of a different element. In my view, this will be constitutionally valid only if upon proof beyond reasonable doubt of the substituted element it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the essential element. If the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, then the substitution infringes ss. 7 and 11(*d*). [Emphasis added]
>
> *Vaillancourt*, at p 656

25. The Court repeated the same point in *Whyte* and again in *Downey*. The law is clear. A mandatory fact presumption does not infringe s. 11(d) of the *Charter* if a properly instructed trier of fact could not reasonably acquit on proof of the substituted element. As stated in *Downey*:

> Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to

> be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s. 11(*d*) if it requires the trier of fact to convict in spite of a reasonable doubt. [Emphasis added]
>
> *Downey*, at p 29; see also *Whyte*, at pp 18-19

26. Therefore, the validity of the presumption must be assessed by asking if proof an interlocutor was represented to be underage would, in the absence of any evidence to the contrary, necessarily prove the accused believed the interlocutor was underage. The Ontario Court of Appeal concluded that it would not. Saskatchewan respectfully submits the Court erred for the reasons that follow.

iii) Not All Doubts are Reasonable

27. In a very real sense, the constitutionality of s. 172.1(3) may be assessed by asking what reasonable inferences a properly instructed trier of fact could draw from an Internet communication like this one:

> Interlocutor: I am 14 years old.
> Accused: Will you have sex with me?

28. The Court of Appeal concluded that because Internet representations are notoriously unreliable, a trier of fact considering a communication like the one reproduced above, could be left with a reasonable doubt that the accused believed the interlocutor was a minor, even in the absence of evidence to the contrary. With respect, this conclusion was flawed by a failure to consider basic criminal law principles that define the limits of the Crown's persuasive burden to prove guilt beyond a reasonable doubt.

29. As already stated, this Court has plainly stated that the constitutional validity of statutory presumptions must not be measured by requiring them to permit unreasonable acquittals. The real test — the only test — is whether the presumption operates to permit or require a conviction despite the existence of a reasonable doubt. Therefore, as a first step in considering whether the presumption offended s. 11(d), the Court of Appeal should have reminded itself that not all doubts are reasonable. The Crown is not required to prove guilt to an absolute certainty and is not obliged to rebut imaginary, speculative or frivolous doubts. A reasonable doubt is one that is

based on reason and common sense and it is logically derived from evidence or the absence of evidence.

R v Lifchus, [1997] 3 SCR 320, at para 39

30. Secondly, the Ontario Court of Appeal should have acknowledged that the presumption of innocence does not confer a right to assert a defence lacking an air of reality. The test for determining when there is an air of reality to a defence is well established and, for the purposes of this case, very instructive. A defence has an air of reality if there is evidence on the record that is capable of supporting a reasonable inference the defence may apply. Conversely, if the defence cannot be reasonably inferred from the evidence, it cannot succeed and should not be left for the trier of fact to consider at all. This ensures the trier of fact is not distracted from the task of rendering a true and just verdict by outlandish, farfetched or fanciful defences.

R v Cinous, 2002 SCC 29, at paras 47, 49, 63 and 84, 2 SCR 3

31. In *R v Osolin*, the Court held that the presumption of innocence is not violated by a threshold requirement a defence have an air of reality before it is left with a jury to consider. That observation is unimpeachable and entirely consistent with the Court's previous s. 11(d) jurisprudence which stated that the presumption of innocence does not guarantee a right to an unreasonable acquittal.

R v Osolin, [1993] 4 SCR 595, at pp 687-688

32. The Court of Appeal's reasoning was also flawed by its failure to consider common law principles relating to reckless indifference and wilful blindness. Those principles would apply to Internet luring cases even if Parliament had not stipulated a due diligence requirement in s. 172.1(4).

33. At common law, the requisite *mens rea* for crimes of subjective intent includes a subjective awareness of a risk associated with the contemplated act coupled with an intent to commit the act with reckless disregard for the consequences. Recklessness is found in "the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk". Recklessness in this sense is different than simple negligence and it is an error of law to equate one with the other.

R v H. (A.D.), 2013 SCC 28, at para 79, 2 SCR 269; *R v Sansregret*, [1985] 1 SCR 570, at pp 581-582; *R v Buzzanga*, (1979) 49 CCC (2d) 369 (Ont CA), at para 25

34. Thus, an accused person had the requisite *mens rea* for the offence of rape if he had sexual intercourse with a female person knowing the complainant did not consent or if he was in a state of recklessness about whether she was consenting or not.

R v Pappajohn, [1980] 2 SCR 120, at p 140; *R v Bernard*, [1988] 2 SCR 833, at pp 878-888

35. Necessary knowledge may also be proven by evidence an accused was wilfully blind. Wilful blindness exists when an accused person has become aware of the need for some inquiry but declines to make the inquiry because he does not wish to know the truth. While the culpability in recklessness is justified by a consciousness of the risk and proceeding in the face of it, the culpability in wilful blindness is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.

R v Hinchey, [1996] 3 SCR 1128, at paras 113-115

36. With those principles in mind, the issue should be stated again. Putting aside s. 172.1(3) entirely, could a properly instructed trier of fact have a reasonable doubt about whether an accused believed an interlocutor was underage, was recklessly indifferent about the interlocutor's age or was wilfully blind about the interlocutor's age based solely on the following Internet communication:

Interlocutor: I am 14 years old.
Accused: Will you have sex with me?

37. Saskatchewan respectfully submits the answer to that question is obvious. Proof of an online representation the interlocutor was a minor coupled with evidence the accused either accepted the representation as being true or did not take reasonable steps to determine if it was false, necessarily proves the accused believed it to be true, was recklessly indifferent as to its truth or was wilfully blind as to its truth. In those circumstances, in the absence of any evidence to the contrary, there could be no air of reality to the notion the accused made a "morally innocent" mistake. Any doubt entertained by a trier of fact on the issue would be frivolous, imaginary and speculative.

38. The error in the Court of Appeal's conclusion is perhaps even more starkly revealed if one takes the computer out of the mix and considers the issue in the context of "real world" sexual interactions between consenting adults or between adults and minors. If one adult is accused of sexually assaulting another adult, the Crown bears the onus of proving the accused knew the complainant was not consenting when the force was applied. Just as s. 171.2(3) operates as a flashing red light in Internet luring cases, a complainant's communication of a lack of consent operates as a flashing red light in those circumstances.

39. The point was made in *R v Ewanchuk* when the Court stated:

> Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. [Emphasis added]

R v Ewanchuk, [1999] 1 SCR 330, at para 52

40. In *Ewanchuk*, this Court did not merely order a new trial. The Court found Mr. Ewanchuk guilty because there was no air of reality to his assertion that he honestly believed the complainant consented. As a matter of law, Mr. Ewanchuk could not be acquitted because the complainant never said "yes" after she said "no".

41. The law operates the same way in cases involving real world sexual encounters between adults and minors. If an adult person were to touch a 14 year old girl for a sexual purpose immediately after the girl told him that she was 14 years old, a mistake of fact defence could not possibly succeed in the absence of some evidence the accused did not believe the representation to be true. The law is clear. To succeed, a mistake of fact defence must, as a minimum, be supported by an assertion that a mistake was made and, even then, there may be no air of reality to the defence.

R v Moise, 2016 SKCA 133, at paras 18 and 27, 343 CCC (3d) 16

42. In summary, the Court of Appeal erred in finding s. 172.1(3) violated the presumption of innocence. The constitutionality of this presumption must not be judged on the basis of whether

it allows for unreasonable acquittals. In the absence of any evidence capable of raising a reasonable doubt that an accused did not accept an online representation about age as being true or did not take reasonable steps to verify whether it was true or not, a properly instructed trier of fact could not entertain a reasonable doubt about guilt.

iv) In the alternative, if s. 172.1(3) Infringes the Presumption of Innocence, the Infringement is Justified under s. 1 of the *Charter*

43. Saskatchewan respectfully adopts Ontario's submissions on the s. 1 issue and makes the following additional submissions. The Court of Appeal's proportionality analysis was limited to an assessment of the presumption's effectiveness in facilitating prosecution of Internet luring offences. The Court assumed the presumption had no other valid legislative objective. The Court doubted whether it was effective because there was no evidence it actually increased the number of convictions that would ordinarily occur without resort to the presumption or that there would be a problem with unjustified acquittals if it did not exist.

Appellant's record, Vol 1, Tab 4, at para, 73, Court of Appeal decision

44. With respect, facilitating prosecution of Internet luring cases is not the only legislative objective of s. 172.1(3). In fact, that is probably not even its primary objective. The primary objective of s. 172.1(3) is to protect children by regulating the conduct of adults who are interested in pursuing online sexual relationships with strangers. It puts the responsibility on adults to act like adults and take care not to ensnare minors in their online sexual pursuits. In the face of a representation that an adult is communicating with a child, the adult must stop and proceed only when reasonable steps have been taken to verify the age of the person he or she is communicating with.

45. Parliament cannot possibly draft legislation that would eliminate all mistakes but it does have the constitutional responsibility and authority to enact rules to reduce the possibility of error and the consequent harm such error may cause. Considered from that perspective, when it comes to protecting children from the kinds of harm occasioned by Internet luring offences, the enactment of s. 172.1(3) is both reasonable and necessary.

46. Finally, to the extent that Saskatchewan's submissions relating to the limits of the Crown's persuasive burden of proof and the relevance of common law concepts such as reckless

indifference and wilful blindness are relevant, those principles support the appellant's submission that if there is a *Charter* infringement, it is saved under s. 1.

B. Subsection 172.1(4) does not Infringe s. 7 of the *Charter*

47. Parliament has imposed an obligation on adults who use telecommunication devices to pursue sexual relationships with strangers to take reasonable steps to avoid ensnaring minors. The respondent accepts the constitutional validity of this provision as it relates to Internet communications between adults and minors but claims it infringes s. 7 of the *Charter* in circumstances where an accused is communicating with a police officer pretending to be a child. According to the respondent, in cases of that kind, unless the Crown proves the accused believed he was talking to a child, the reasonable steps requirement will infringe s. 7 because, "at best", it will permit convictions on proof of mere negligence.

Respondent's factum, at paras 50, 51 and 55

48. With respect, the respondent's submissions are not sustainable. They are based on a misunderstanding of the elements of the Internet luring offence and governing constitutional principles.

i) The Difference Between Subjective and Objective Fault

49. As a matter of statutory interpretation, it is presumed that crimes include a positive state of mind such as intent, knowledge, recklessness or wilful blindness. This presumption arises out of a long and inexorable evolution of common law towards a system of justice that punishes only the morally culpable. With the decision in *Vaillancourt*, this principle was elevated from being merely a principle of statutory interpretation to a principle protected by s. 7 of the *Charter*. At the same time, this Court made it clear that s. 7 is not infringed by the creation of crimes based on objective fault requiring a "marked departure" from the standard of care expected of a reasonable person.

R v Hess; R v Nguyen, [1990] 2 SCR 906, at pp 913-915; *R v Hundal*, [1993] 1 SCR 867

50. The feature which distinguishes subjective fault from fault of the purely objective variety is the subjective awareness of risk. Whereas subjective fault includes a subjective awareness that the contemplated act will likely bring about the prohibited consequence, simple negligence or

pure objective fault is based solely on risks an accused did not subjectively foresee but would have been foreseen by a reasonable person. The "fault" in objective fault lies in the failure of a person to direct his or her mind to a risk a reasonable person would have appreciated.

R v Creighton, [1993] 3 SCR 3, at p 58

51. Therefore, a legislative direction that an accused take reasonable steps in the context of a situation where reasonable care should be taken does not have the effect of converting a crime of subjective *mens rea* into a crime of "mere negligence". If it were otherwise, all *Criminal Code* offences requiring an accused to take "reasonable steps" would run afoul of s. 7. As noted in *R v Darrach*, the insertion of a reasonable steps requirement into an offence requiring subjective *mens rea* merely introduces an objective component into the mix that is personalized according to the subjective awareness of the accused at the time.

R v Darrach (1998), 122 CCC (3d) 225 (Ont CA), at para 88

52. Furthermore, a legislative direction that people exercise due diligence in circumstances where they have a subjective awareness of risk is entirely consistent with the principle that the morally innocent should not be punished.

Nguyen, at pp 917-918

ii) Internet Luring is a Crime of Subjective Fault

53. A person cannot commit the offence of Internet luring through mere negligence. Internet luring is a crime of subjective fault that cannot be committed by the "morally innocent". There must be proof of an intention to communicate and proof of an intention to facilitate the commission of one of the listed offences. The Crown is not required to prove an accused intended to physically meet the person to commit any of the specified offences but the Crown must prove the accused intended to facilitate, help bring about or make more probable the commission of one or more of the specified offences.

Legare, at paras 25 and 28

54. How can an accused intentionally facilitate the commission of one or more of the listed offences without believing the online interlocutor was underage? That question is at the core of the respondent's submissions and the answer to it may be found in a review of the essential elements of the listed offences.

55. The respondent was charged with an offence under s. 172.1(1)(b) which makes it an offence to facilitate any one of eight listed crimes. Seven of those are sexual offences involving children. All seven are referred to in s. 150.1(4) which states that if an accused is charged with any one of those crimes, it is not a defence the accused believed the complainant to be 16 years or older unless the accused took all reasonable steps to ascertain the complainant's age.

56. Therefore, whether an accused meets a 14 year old child on a playground and invites her to touch herself sexually, or whether he extends the same invitation to persons identifying themselves as 14 year old children on the Internet, the result is the same. In both instances, regardless of what the accused believed the age of the other person to be, the failure to take reasonable steps to ascertain age is culpable. For that reason, Saskatchewan respectfully disagrees with the Court of Appeal's suggestion that what happened in this case "is by definition negligence".

57. Internet luring cases involving police officers who pose as children invariably involve proof the accused was subjectively aware of the risk that the person he or she was communicating with was underage. Remember the facts in *Levigne*, where the trial judge found the accused was "alert to the possibility he was actually talking to a 13 year old". Here, the trial judge found the respondent to be "indifferent" about the online interlocutor's age. As a matter of law, an accused person's indifference about age counts. For that reason, it was an error or law for the Court of Appeal to equate that mental state with mere negligence.

Levigne, at para 18; Appellant's record, Vol I, Tab 2, Reasons for conviction, at para 21

iii) Communicating for the Purpose of Facilitating a Crime is Not an Imaginary Crime

58. The respondent relies on the decision of *United States of America v Dynar* to argue that in Internet luring cases involving police officers posing as children, the failure of the Crown to prove the accused believed the interlocutor was underage leads to a situation where an accused can be punished for committing an imaginary crime. Saskatchewan sees nothing in the *Dynar* decision that actually supports the respondent's submissions.

United States of America v Dynar, [1997] 2 SCR 462

59. *Dynar* held that factual and legal impossibility do not operate as a defence to inchoate crimes like attempts and conspiracies. Thus, a thief reaching into an empty pocket with the intent to steal a wallet is guilty of an attempt to commit theft even if it was factually impossible for him to steal a wallet. At the same time, the Court recognized that it is not possible to attempt to commit or conspire to commit an "imaginary crime". An imaginary crime involves an act an accused thinks is illegal but is not unlawful at all.

60. With respect, there is nothing imaginary about the crime of Internet luring or about any of offences listed in s. 172.1(1)(b). A person who communicates with another with the intent to facilitate the commission of one of those crimes commits a real crime with real and not imagined criminal intent.

C. The Mandatory Minimum Sentence does not Infringe s. 12 of the *Charter*

61. Saskatchewan respectfully submits the mandatory minimum sentence for child luring offences does not infringe s. 12 of the *Charter*. The Court of Appeal's conclusion to the contrary was flawed by a failure to properly apply governing *Charter* principles and a failure to conduct the kind of particularized inquiry mandated by law. Considering the gravity of the child luring offence and the moral culpability of anyone who commits it, the one year mandatory minimum sentence is neither cruel nor unusual punishment.

i) The Analytical Framework to be Applied

62. An applicant who asserts a mandatory minimum sentence infringes s. 12 of the *Charter* is required to overcome a high threshold. He must do more than prove the sentence would be or could be demonstrably unfit, disproportionate or excessive. A cruel and unusual sentence is an abhorrent and intolerable sentence that would outrage the community's sense of decency. It must be grossly disproportionate.

> *R v Lloyd*, 2016 SCC 13 at para 24, [2016] 1 SCR 130; *R v Morrisey*, 2000 SCC 39, at para 26, 2 SCR 90; *R v Smith*, [1987] 1 SCR 1045, at p 1072

63. A mandatory minimum sentence represents a "forceful expression of government policy in the area of criminal law" by lawmakers who speak on behalf of the Canadian citizens they serve. The enactment of a mandatory minimum sentence represents the "considered view" of those elected lawmakers about the relative importance of prevention, deterrence, retribution and

rehabilitation in relation to certain crimes. Consequently, courts should override such considered views only in the clearest of cases. Just as an appellate court must substantially defer to a sentencing judge's exercise of the broad sentencing discretion in ordinary sentencing cases, substantial deference is also owed to Parliament's expression of sentencing policy.

Lloyd, at para 60; *R v Goltz*, [1991] 3 SCR 485, at pp 501-503

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

Morrisey, at paras 27-29; *Goltz*, at pp 499-500

65. If the mandatory minimum sentence would not be grossly disproportionate in the individual circumstances of the case, the Court must consider whether it would be in other reasonably foreseeable cases. Reasonably foreseeable cases do not include far-fetched, remote or marginally imaginable cases.

Morrisey, at para 30

ii) The Court of Appeal's s. 12 Analysis was Flawed

66. The Court of Appeal did not conduct the kind of fulsome inquiry described above. Besides failing to consider the actual effect of the punishment on the individual including the prospects for parole and early release that were considered in *Morrisey*, the Court made little or no effort to consider the penological goals and sentencing principles underlying Parliament's considered view that mandatory minimum sentences should be imposed on those who lure children.

67. Most importantly though, the Court did not identify the appropriate range of sentences for similar offenders who commit similar crimes. Instead, the Court focused on whether the sentence imposed in this case was demonstrably unfit. After resorting to principles that are normally applied in ordinary sentence appeal cases to conclude a four month sentence was fit, the Court used that finding as the benchmark for its conclusion that s. 12 was infringed.

68. This is precisely the kind of analysis the Court identified as being improper in *Goltz*:

> *Smith* makes it plain that gross disproportionality must be determined by paying close attention both to the particular situation in which the offence occurred and to the personal traits of the offender, though it clearly does not go as far as a complete individualization of sentencing, which might put into question the constitutional validity of mandatory minimum sentences generally.
>
> *Goltz*, at p 503

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

R v M. (C.A.), [1996] 1 SCR 500, at para 92

70. Therefore, even if the Court of Appeal was correct in holding that a four month sentence would be fit in the circumstances of this case, that conclusion said nothing about whether a higher sentence would have been demonstrably unfit or, more to the point, grossly disproportionate. The Court could not avoid conducting the kind of particularized inquiry mandated by the *Goltz* and *Morrisey* decisions by resting its conclusion on ordinary appellate review principles applicable in sentence appeal cases.

71. The Court of Appeal should have considered whether the appropriate range of fit sentences for this kind of offence committed by this kind of offender rendered the mandatory

minimum sentence grossly disproportionate. Had the Court asked that question it would have inevitably concluded the mandatory minimum sentence did not infringe s. 12. That much is clear from the numerous authorities cited in the appellant's factum.

Appellant's factum, paras 81-82

72. Parliament enacted the mandatory minimum sentences for child luring offences after the *Jarvis* and *Woodward* decisions of the Ontario Court of Appeal. *Jarvis* was a 2006 case that suggested the general range for child luring offences was12 to 24 months imprisonment. *Woodward* was decided in 2011 and there the Court suggested there was a need to revise that general range upwards because Parliament doubled the maximum punishment in 2007. The Saskatchewan Court of Appeal has also followed those decisions.

R v Jarvis, (2006), 211 CCC (3d) 20 (Ont CA), at para 31; *R v Woodward*, 2011 ONCA 610, at para 58, 276 CCC (3d) 86; *R v Miller*, 2016 SKCA 32, at para 23, 476 Sask R 150

73. In addition to the *Jarvis* and *Woodward* decisions, the appellant has cited numerous lower court sentencing cases involving similar offenders who were detected and charged after they communicated with police officers posing as children. Most if not all of those offenders were like the respondent, in that they were mature individuals with good community support and no criminal history. Some claimed they did not believe they were communicating with a child. All were sentenced to terms ranging from 12 to 21 months imprisonment.

74. Based on all of these authorities, it is clear that the mandatory minimum sentence does not infringe s. 12 of the *Charter*. The minimum sentence is well within the range of appropriate fit sentences for similar offenders who commit similar offences. Even if it exceeds that range, the excess cannot reasonably be described as being grossly excessive or sufficient to meet the high threshold defining cruel and unusual punishment.

75. The failure to conduct the particularized inquiry was not the only error undermining the Court of Appeal's s. 12 analysis. The Court also erred by reasoning as if the respondent was culpable only because he was negligent. For the reasons already set out, Saskatchewan respectfully submits child luring is a crime of involving specific intent and subjective fault. It is not a crime that can be committed through mere negligence.

76. Based on the trial judge's findings at trial, it was an error of law to equate the respondent's moral culpability with mere negligence. There was no dispute about the nature of the communications here. The respondent received an email from a person he did not know who identified herself as a 14 year old girl named Mia. When he responded to that email, he immediately moved the conversation to sexual topics. He asked Mia if she was "into sex" and if she masturbated. When Mia told him that she did not do that sort of thing because her mother told her not to, the respondent encouraged her not to listen to what her mother said. He told her how to masturbate, encouraged her to do so and report back to him later. Thereafter, the respondent engaged in sexualized communications with Mia on a sporadic basis for more than two months without taking any reasonable steps to ascertain Mia's age.

Appellant's record, Vol I, Tab 2, Reasons for conviction, at para 21

77. Although the respondent testified that he believed the person he was speaking with was an adult, the trial judge did not accept his testimony as being true. He found the respondent was "content to engage in sexualized communication with someone who might be underage" and that he was indifferent about the age of the person with whom he was communicating.

Ibid., at paras 24-28

78. There is nothing unusual or unique about these facts. That much is clear from the facts in *Levigne* and the other cases cited in the appellant's factum. These facts are typical of child luring offences detected through sting operations. The respondent intentionally communicated with a person identifying herself as a child, for the specific purpose of facilitating a prohibited offence, and did not care whether he was communicating with a child or not when he did so. That is not mere negligence and it was an error of law to conclude otherwise.

79. To be clear, Saskatchewan accepts that there will be varying levels of moral culpability in child luring offences. The offender who deliberately sets out to ensnare a child is likely more blameworthy than an offender who merely takes advantage of an opportunity when it arises. An offender who believes he is communicating with a child is likely more blameworthy than an offender who does not care if he communicating with a child or not. However, these distinctions merely beg the question. The issue was not whether the respondent might be more or less culpable than other offenders but whether his moral culpability or that of other similarly situated

offenders was so minimal that it would offend the community's sense of decency to impose a sentence of twelve months imprisonment.

80. Saskatchewan submits that any person who is subjectively aware of the risk he may be communicating with a child but is indifferent to that risk and communicates for the purpose of facilitating one of the listed offences has a very high level of moral culpability. This is precisely the kind of conduct Parliament intended to denounce, deter and prevent. This conclusion is supported not just by law but also by basic community standards of decency. For that reason, the Court should find that the mandatory minimum sentence in s. 172.1 does not infringe s. 12.

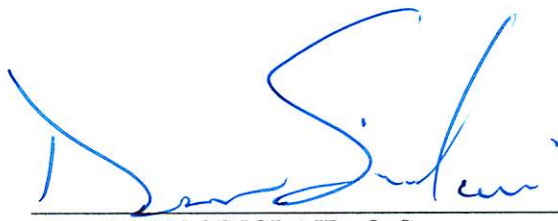
PART IV

ORDER SOUGHT

81. Saskatchewan respectfully submits the Court should find that ss. 172.1(3), 172.1(4) and the mandatory minimum sentence under s. 172.1(2)(a) of the *Criminal Code* do not infringe the *Charter*.

ALL OF WHICH is respectfully submitted.

DATED at the City of Regina, in the Province of Saskatchewan, this 9th day of May, A.D. 2018.



W. DEAN SINCLAIR, Q.C.
Agent of the Attorney General for the
Province of Saskatchewan

KATHERINE M. ROY
Agent of the Attorney General for the
Province of Saskatchewan

PART V

TABLE OF AUTHORITIES

CASES	**PARAGRAPH(S)**
R v Alicandro, 2009 ONCA 133, 246 CCC (3d) 1	11, 12
R v Bernard, [1988] 2 SCR 833	34
R v Buzzanga, (1979) 49 CCC (2d) 369 (Ont CA)	33
R v Cinous, 2002 SCC 29, 2 SCR 3	30
R v Creighton, [1993] 3 SCR 3	50
R v Darrach (1998), 122 CCC (3d) 225 (Ont CA)	51
R v Downey, [1992] 2 SCR 10	22, 23, 25
R v Ewanchuk, [1999] 1 SCR 330	39, 40
R v George, 2017 SCC 38, 1 SCR 1021	21
R v Goltz, [1991] 3 SCR 485	63, 64, 68, 70
R v H. (A.D.), 2013 SCC 28, 2 SCR 269	33
R v Hess; R v Nguyen, [1990] 2 SCR 906	49, 52
R v Hinchey, [1996] 3 SCR 1128	35
R v Hundal, [1993] 1 SCR 867	49
R v Jarvis, (2006), 211 CCC (3d) 20 (Ont CA)	72, 73
R v Legare, 2009 SCC 56, 3 SCR 551	12, 13, 14, 53
R v Levigne, 2010 SCC 25, 2 SCR 3	13, 16, 18, 19, 20, 57
R v Lifchus, [1997] 3 SCR 320	29
R v Lloyd, 2016 SCC 13, [2016] 1 SCR 130	62, 63
R v MacLean, 2016 SKCA 93, 484 Sask R 137	11, 12
R v M. (C.A.), [1996] 1 SCR 500	69

CASES	**PARAGRAPH(S)**
R v Miller, 2016 SKCA 32, 476 Sask R 150	72
R v Moise, 2016 SKCA 133, 343 CCC (3d) 16	41
R v Morrisey, 2000 SCC 39, 26, 2 SCR 90	62, 64, 65, 66, 70
R v Oakes, [1986] 1 SCR 103	22, 23
R v Osolin, [1993] 4 SCR 595	31
R v Pappajohn, [1980] 2 SCR 120	34
R v Sansregret, [1985] 1 SCR 570	33
R v Smith, [1987] 1 SCR 1045	62, 68
R v St-Onge Lamoureux, 2012 SCC 57, [2012] 3 SCR 187	22, 23
R v Vaillancourt, [1987] 2 SCR 636	22, 24
R v Whyte, [1988] 2 SCR 3	22, 23, 25
R v Woodward, 2011 ONCA 610, 276 CCC (3d) 86	12, 72, 73
United States of America v Dynar, [1997] 2 SCR 462	58, 59

STATUTORY PROVISIONS	**PARAGRAPH(S)**
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11	10, 22, 25, 29, 31, 43, 45, 47, 49, 51, 61 – 75, 79, 80
Criminal Code, RSC 1985, c C-46	9, 10, 12, 13, 14, 16 – 21, 27, 32, 36, 38, 42, 44, 45, 55, 60