Court File No. 37687

IN THE SUPREME COURT OF CANADA
(On appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N:

HER MAJESTY THE QUEEN

Applicant / Respondent on Cross-Appeal
[Appellant / Respondent]

-and-

DOUGLAS MORRISON

Respondent / Applicant on Cross-Appeal
[Respondent / Appellant]

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
AND CROSS-APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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MEMORANDUM OF ARGUMENT

PART I - STATEMENT OF FACTS

A. OVERVIEW OF RESPONDENT/APPLICANT'S POSITION

1. The Respondent/Applicant ("the Respondent")[1], Douglas Morrison, was convicted of one count of child internet luring contrary to s. 172.1(b) of the *Criminal Code* on January 16, 2015 before the Honourable Justice Gage. Two constitutional challenges were litigated at trial. The first was a challenge to ss. 172.1(3) and (4) pursuant to ss. 7 and 11(d) of the *Charter* on the basis that the structure of these sections violates the presumption of innocence and offends the principles of fundamental justice. The second challenge was to the one-year mandatory minimum sentence. The trial judge accepted that 172.1(3)—the presumption of age—was unconstitutional and declared it to have no application to the proceedings before him. He dismissed the challenge to 172.1(4)—the reasonable steps requirement—finding it to be constitutional. It was ultimately 172.1(4) that led to the conviction of the Respondent based on the trial judge's finding that the Respondent failed the reasonable steps inquiry, despite the trial judge having had a reasonable doubt about the Respondent's evidence that he believed the interlocutor to be of legal age.

2. At the sentencing hearing the Respondent applied to strike down the mandatory minimum sentence of one-year imprisonment under s. 172.1(2)(a) of the *Criminal Code* on the basis that it

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[1] Mr. Morrison is both the Respondent to the Crown's Application for leave to appeal and the Applicant for leave to cross-appeal in relation to the Court of Appeal for Ontario's decision to affirm s. 172.1(4) as being constitutional. For ease of reference, he is referred to as "the Respondent" throughout this factum and the Crown Applicant/Respondent is referred to as "the Crown."

constituted cruel and unusual punishment, contrary to s. 12 of the *Charter*. The application was granted and the Respondent was sentenced to a 75-day intermittent jail sentence (after pre-sentence credit was deducted) and in addition the usual ancillary orders. The Respondent has since served his intermittent sentence but remains subject to the ancillary orders. Before the Ontario Court of Appeal, the Crown did not seek the Respondent's re-incarceration in the event that their position was successful.

3. The Crown appealed the ruling of constitutional invalidity with respect to the mandatory minimum one-year sentence. The Respondent appealed the ruling regarding the constitutionality of the structure of s. 172.1 of the *Criminal Code*. The Court of Appeal for Ontario affirmed all the rulings made by the trial judge. These three constitutional rulings are the subject of this leave application. The Crown seeks leave to appeal the rulings pertaining to ss. 172.1(3) and 172.1(2)(a). The Respondent takes no position in respect to the Crown's application for leave to appeal. The Respondent further seeks leave to appeal the Court of Appeal for Ontario's ruling dismissing his appeal against s. 172.1(4) on the basis that it is unconstitutional pursuant to s. 7 of the *Charter*.

4. The Respondent agrees that the issues at stake on this appeal raise issues of national importance. This leave application deals with a section of the *Criminal Code* that comes before this court with two subsections struck down. Without a unifying decision, these issues may have to be addressed on a province-by-province basis, which could lead to inconsistent results. Resolution of these issues will provide guidance and clarity with respect to the statutory construction and the penalty provisions of a complex *Criminal Code* offence that aims to circumscribe cyber communications with the laudable goal of protecting children. Moreover, it is the Respondent's position on its cross-application that it is in the interest of justice that the constitutionality of s. 172.1(4) be addressed together with the Crown appeal.

PART II – QUESTIONS IN ISSUE

5. The Respondent takes no position in relation to the issues raised by the Crown in their application for leave to appeal (see ¶23 of the Crown's memorandum of argument)—both in relation to the constitutionality of s. 172.1(3) and the mandatory minimum sentence—and acknowledges their public and national importance. The Respondent also raises the following issue by way of a cross-application for leave to appeal:

> **(1) Did the Court of Appeal for Ontario err in finding that the reasonable steps requirement in s. 172.1(4) of the *Criminal Code* did not infringe the right to life, liberty and security of the person under s. 7 of the *Charter*?**

6. In essence, the Respondent takes the position that should the Court grant leave to hear the arguments in this case, they should hear and consider all the disputed facets of the application and intent behind s. 172.1, including both the subsections that were impugned below.

PART III – STATEMENT OF ARGUMENT

A. THE COURT OF APPEAL FOR ONTARIO ERRED IN ITS FINDING THAT SECTION 172.1(4) IS CONSTITUONAL

7. The Respondent's cross-application for leave to appeal is based on the Court of Appeal for Ontario's conclusion that s. 172.1(4) did not violate s. 7 of the *Charter*. The Court found that the stigma and moral blameworthiness of internet luring of children was high, but not as high as murder (or similar offences) such as to be an offence that required *purely subjective intent*. The Court acknowledged that the failure to take reasonable steps to ascertain the age of the interlocutor injected an *objective element* into the fault standard. Consequently, the Court reasoned there are two pathways to liability for internet luring: (i) where the Crown proves subjective belief in an underage interlocutor; or (ii) where the Crown proves the accused did not take reasonable steps to ascertain the age of the interlocutor. The Court rejected the Crown's argument that a conviction for internet luring necessarily meant the *mens rea* was fully subjective because the facilitation component was fully subjective. The Court made clear that "a failure to take the steps expected of a reasonable person is by definition negligence." The Court analogized s. 172.1(4) with the reasonable steps requirement for sexual assault offences, s. 273.2(b). Pardu J.A. considered the judgment of Morden A.C.J.O. in *Darrach*[2] and applied it to 172.1(4). She reasoned that similar to s. 273.2(b), 172.1(4) had a sufficient subjective dimension to dilute what might otherwise be a purely objective standard. Pardu J.A. found it inapt to import a marked departure standard to the negligence standard given there are no well-established norms on the internet. The Court applied

[2] [1998] OJ No 397 (CA).

and adopted the reasoning in *Darrach* to uphold the constitutionality of reasonable steps for internet luring:

> [101] No doubt, even if the reasonable steps requirement in s. 172.1(4) is analogous to that in s. 273.2(b), it still has an objective dimension. The fault element for child luring established by subsection (4) is not purely subjective, even if it is not purely objective. However, I am not persuaded that the stigma of being convicted of child luring constitutionally mandates a purely subjective standard of fault, akin to the stigma of murder. As in *Darrach*, it is difficult to contemplate that a person who continues a sexual conversation where there is reason to believe his or her interlocutor is under age is "morally innocent". The moral culpability associated with failing to take reasonable steps to ensure that one's online communications do not amount to sexual predation of children is proportionate to the degree of stigma attached to the child luring offence, particularly given that the catastrophic consequences for child victims of internet luring are widely accepted and acknowledged: …
>
> [102] For these reasons, I conclude that the reasonable steps requirement in s. 172.1(4) of the *Code* does not infringe s. 7 of the *Charter*. [Emphasis added.]

8. The Court of Appeal for Ontario erred in holding that s. 172.1(4) did not violate s. 7 of the *Charter*. The Court failed to consider several aspects of the provision that make its application constitutionally infirm and differentiates it from cases where "reasonable steps" have been affirmed in the *physical*—as opposed to the *cyber*—realm:

1) unlike s. 273.2(b), the reasonable steps requirement in s. 172.1(4) is not amenable to a mistake of fact defence for the belief offence;
2) the Court of Appeal's analogy of reasonable steps under s. 172.1(4) and s. 273.2(b) is
3) the nature of cyber communications negates the efficacy of the reasonable steps requirement for internet luring;
4) the reasonable steps requirement in s. 172.1(4) dilutes the *subjective nature* of this high stigma offence with no value added; and,
5) the timing of when reasonable steps can be done creates situations where potentially innocent persons are convicted.

(1) Unlike s. 273.2(b), the reasonable steps requirement in s. 172.1(4) is not amenable to a mistake of fact defence for the belief offence

9. In respect to concerns over the absence of a mistake of fact at ¶90 in *Darrach* Morden A.C.J.O. made clear that the accused who took reasonable steps and formed a wrong conclusion about consent might still avoid a criminal conviction based on a mistake of fact defence—a failsafe mechanism so to speak:

> The provision does not require that a mistaken belief in consent must be reasonable in order to exculpate. The provision merely requires that a person about to engage in sexual activity take "reasonable steps ... to ascertain that the complainant was consenting." Were a person to take reasonable steps, and nonetheless make an unreasonable mistake about the presence of consent, he or she would be entitled to ask the trier of fact to acquit on this basis. [Emphasis added.]

It is important to note that when mistake of fact arises in a sexual assault case, the complainant will have testified that she did not consent to sexual activity—*i.e.* there is independent *prima facie* evidence upon which to gauge the accused's claim of mistaken belief. It is simply not possible to analogize the underlined passage above to internet luring (a belief offence) because there is no measure upon which to assess the "mistake" in a 172.1(4) inquiry. As previously noted, the mistake of fact defence for s. 273.2(b) acts as a failsafe mechanism to alleviate the risk of wrongful conviction. It is an essential ingredient that allowed s. 273.2(b) to be upheld as constitutional in *Darrach*. There is no equivalent for s. 273.2(b) in the s. 172.1(4) inquiry. An accused who testifies he believes the interlocutor to be of legal age is correct and s. 172.1(4)—unlike s. 273.2(b)—provides no quantifiable basis to reject that evidence. The reasonable steps requirement in 172.1(4) allows for the conviction of the innocent, thereby violating s. 7 of the *Charter* and the Court of Appeal for Ontario was wrong to find otherwise.

(2) The Court of Appeal for Ontario's analogy of reasonable step under s. 172.1(4) and s. 273.2(b) is problematic

10. The Court of Appeal for Ontario's analogy between ss. 273.2(b)—which is the section dealing with mistaken belief of consent in the context of a sexual assault—and 172.1(4) provides another ready example of a problem specific to the internet luring context of requiring "reasonable steps". In *Butler*,[3] the trial judge convicted the accused and found he committed a sexual assault, but he did so without actually deciding whether the Crown had proven that the complainant did not consent. Instead, the trial judge moved directly to a consideration of whether the defence of

[3] [1998] OJ No 392 (CA).

honest, but mistaken, belief in the complainant's consent, available under s. 273.2(b), had been negated by the Crown. At issue in the appeal was whether the trial judge failed to make the critical findings of fact before considering mistaken belief, including whether the accused in that case had taken reasonable steps. The Court wrote at ¶¶6 and 8:

> An analysis of the trial judge's reasons for judgment discloses that he failed to make critical findings of fact before he considered the application of s. 273.2. In particular, he failed to determine whether the Crown had proved the absence of consent. If the trial judge had a reasonable doubt on this central issue, he was required to acquit the appellant.
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> ...
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> Section 273.2 does not come into play until it has been proved that the complainant did not consent to the sexual activity and there is evidence capable of supporting the defence that the accused honestly believed that the complainant consented to it. In this appeal, the trial judge failed to make the first determination before commencing his s. 273.2 analysis. This, in my view, resulted in reversible error. [Emphasis added.]

Lack of consent (an essential element for sexual assault) in 273.2(b) can be analogized to a legal age interlocutor or belief in a legal age interlocutor (which is needed to proceed with sexualized chat) in 172.1(4). In *Butler*, the Court made clear that reasonable steps to ascertain consent are *not engaged* until the Crown proves absence of consent beyond a reasonable doubt. Applying that principle to the internet luring yields two results, depending on whether the Crown is proceeding on an incident involving *an actual underage child* or the *accused's belief that the interlocutor is underage*:

- First, pertaining to an offence that involves an *actual child,* the analogy works: reasonable steps to ascertain that the interlocutor is of legal age are not engaged until the Crown proves the absence of a legal age interlocutor. Where there is an actual underage child, and the accused claims he believed it was an adult, reasonable steps will act as a failsafe mechanism to avoid conviction for those forming an honest but mistake belief.
- The second result, pertaining to a belief offence, does not work well and breaks down creating conundrums: reasonable steps to ascertain that the interlocutor is of legal age are not engaged until the Crown proves the absence of belief in a legal age interlocutor. This is illogical because where the Crown proves this, the offence has been proven and reasonable steps are not needed. The problem is not corrected

> legal age are not engaged until the Crown proves the absence of belief in a legal age interlocutor. This is illogical because where the Crown proves this, the offence has been proven and reasonable steps are not needed. The problem is not corrected by altering the analysis to the opposite, "reasonable steps to ascertain that the interlocutor is of legal age are not engaged until the Crown proves the absence of belief in an underage interlocutor", because at no time is the Crown trying to do this. Therefore the *Butler* analysis applied to s. 172.1(4) reveals that 172.1(4) works well for an actual child offence but does not work for a belief.[4]

11. The principle expressed in *Butler* is consistent with Dickson J.'s (as he was then) analysis of the due diligence defence in *R v Sault Ste. Marie*.[5] In *Dragos,*[6] the Court concluded that a due diligence formulation was proper for s. 172.1(4) in the same way that it was for s. 273.2(b).[7] In *Sault Ste. Marie*, Dickson J. wrote:

> In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care. [emphasis added.]

Consistent with the pronouncement in *Butler*, the proper operation of the due diligence defence requires the prohibited act to be proven beyond a reasonable doubt before the defence is called upon to show due diligence.

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[4] At trial the Respondent only sought to strike down the operation of 172.1(3) and (4) to the belief offence.

[5] [1978] 2 SCR 1299.

[6] [2012] OJ No 3790 (CA).

[7] At ¶40, the Cronk J.A. wrote:

> The similarity in language between ss. 172.1(4) and 273.2(b) of the *Code* lends further support to the conclusion that a due diligence formulation of the "reasonable steps" requirement is appropriate in the s. 172.1(4) context, as it is under s. 273.2(b).

(3) The nature of cyber communications negates the efficacy of the reasonable steps requirement for internet luring

12. The reasonable steps requirement in s. 172.1(4) is not like the reasonable steps requirements in the *Criminal Code*, such as s. 150.1(4) and s. 273.2(b), which exposes the fallacy in trying to harmonize a consistent approach without running afoul of the *Charter*. These latter two examples allow for the steps to be assessed against an *identifiable entity*: the complainant. In both the consent for sexual contact and age for sexual consent contexts, the accused sees and interacts with the complainant who is ultimately in court to give evidence on the issues—*i.e.* there is a way to compare the accused's assertions to the established contrary evidence. In the s. 172.1(4) context, the interaction is comprised of words on a screen. There is never any way to know if the truth is being stated, whether favourable to the accused or not. Indeed, if the rationale for s. 172.1(4) is the protection of children, in many scenarios, it does little to accomplish that goal. An underage child who enters a chat room pretending to be 18 years old and maintains that lie through, is not protected at all from sexualized chat and grooming by the reasonable steps requirement. The fact that s. 172.1(4) is not efficacious in achieving its purported goal only aggravates the constitutional failings discussed above.

(4) The reasonable steps requirement in s. 172.1(4) dilutes the subjective nature of this high stigma offence with no value added

13. The Court of Appeal's view of "reasonable steps" in s. 172.1(4) also dilutes the subjective nature of this high stigma offence by creating a second pathway for conviction that is not based on fully subjective intent. While it is not unusual for a criminal offence to have a spectrum of moral blameworthiness, this development begs the question: did Parliament intend to create two categories of liability for internet luring? As it stands now, the moral blameworthiness of this offence has been diminished owing to the operation of the reasonable steps requirement, yet this new construction of the offence has not heightened its efficacy to eradicate harm intended and tends to permit conviction of the innocent. These developments have brought forward only negatives and have added no value.

(5) The timing of when reasonable steps can be done creates situations where potentially innocent persons are convicted

14. The Court of Appeal's approach also restricts the timing of when reasonable steps can be done, thereby creating situations where innocent persons are convicted. The wording of s. 172.1(4) does not allow for the steps to be taken *prior* to the conversation with the interlocutor. A genuine role-player who scrupulously prepares his chat room according to a set schedule or routine who then initiates his role-playing game with his usual colleagues without doing the requisite reasonable steps 'dance' is guilty of a criminal offence. By any measure, this person certainly took reasonable steps to assure himself that he would be dealing with a legal aged person, yet s. 172.1(4) would not afford a defence. The steps were not taken *after* the representation of age. This problem may not present itself as starkly in the real world. Real world examples will look like the Respondent's case where the preparation and posting of an ad that mimics the established daddy-daughter role-play formula on an adult website goes a long way towards ensuring only legal age persons will present.

B. IT IS IN THE INTERESTS OF JUSTICES THAT THIS CROSS-APPLICATION BE HEARD TOGETHER WITH THE CROWN APPEAL

15. Should this Court find it appropriate to grant leave to the Crown appeal, it is in the interests of justice that this cross-application in relation to the constitutionality of s. 172.1(4) of the *Code* be granted. Section 172.1 is a relatively nascent provision in the *Criminal Code*, which deals with a distinctly modern phenomenon that of internet luring. Nonetheless, this provision has already come under scrutiny by this Court in two decisions, namely *R v Levigne* and *R v Legare*. In neither instance was the constitutionality of the provision addressed, a fact commented upon by the Court.[8] Given that the constitutionality of subsection (4) was fully litigated both at trial and before the appellate court, there is a full and complete record to decide the question of whether the operation of s. 172.1 is constitutionally infirm, either in whole or in part. This Court is presented with an opportunity to provide guidance to all provincial courts on the constitutionality and appropriate interpretation of the provision. This could avoid the potential risks and costs of on-going litigation surrounding this issue at the provincial level. Indeed, it would be preferable that all problematic facets of the section—and their interplay—be before the Court. This is in keeping with the common law approach to statutory interpretation, which requires that the provision be assessed *as a whole*

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[8] *R v Levigne,* 2010 SCC 25; *R v Legare,* 2009 SCC 56.

to determine its appropriate meaning and the manner in which it should apply. It makes little sense for this Court to ignore potential constitutional infirmities of one subsection when assessing those of another. Such an approach would be unduly restrictive and tie the hands of this Court in determining the validity of the provision.

PART IV – COSTS

16. The Respondent makes no submissions as to costs.

PART V – ORDER REQUESTED

17. Should this Honourable Court grant leave to appeal, the Respondent respectfully requests that leave to appeal the ruling on the constitutionality of s. 172.1(4) of the *Criminal Code* also be granted.

DATED at TORONTO, ONTARIO, this 11th day of September, 2017.

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PART VI - AUTHORITIES RELIED UPON

CASES	*REFERENCED AT PARAGRAPH NO.:*
R v Darrach [1998] OJ No 397 (CA)	7
R v Butler, [1998] OJ No 392 (CA)	10, 11
R v Sault Ste. Marie [1978] 2 SCR 1299	11
R v Dragos, [2012] OJ No 3790 (CA)	11
R v Levigne, 2010 SCC 25	15
R v Legare, 2009 SCC 56	15

PART VII – LEGISLATION

NONE

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