File Number: 40093

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

PROCUREUR GÉNÉRAL OF QUÉBEC

Appellant
(appellant)

- and -

SA MAJESTE LE ROI

Appellant
(appellant)

- and –

H.V.

Intimé
(intimé)

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RULES 37 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

1. Child luring under section 172.1 of the *Criminal Code* is a unique offence. It requires proof of a special, narrow mental element: the specific intention to facilitate a sexual offence against a child. The moral blameworthiness that attaches to that mental element is particularly high, because it involves purposive exploitation of a power imbalance to facilitate the abuse of a vulnerable victim. And in an era of new dangers posed by modern technologies, the child luring offence plays a distinct role in protecting children from sexual violence. Parliament has imposed mandatory minimum sentences for child luring: one year if the offence is prosecuted by indictment, and six months if prosecuted summarily. Assessing the constitutionality of these mandatory minimum sentence provisions requires a careful review of the factors that distinguish child luring from other *Criminal Code* offences.

2. In the factum submitted in the *Marchand* appeal, Alberta argued that the one-year mandatory minimum sentence for child luring prosecuted by indictment does not infringe section 12. The arguments in that factum apply equally to the six-month minimum for child luring by summary proceedings, and Alberta relies on those arguments in *H.V.* as well. This factum supplements those arguments by applying the guidance from this Court's recent rulings in *Hills* and *Hilbach*.[1]

3. Alberta takes no position on the facts.

[1] *R v Hills*, 2023 SCC 2; *R v Hilbach*, 2023 SCC 3

PART II – ISSUE

Question in Issue Does the six-month mandatory minimum sentence for child luring prosecuted summarily infringe section 12 of the *Charter*?

Intervener's Position with regard to Question in Issue

No. The child luring offence requires proof of a narrow, specific *mens rea*, which ensures that all offenders have a high degree of moral blameworthiness. Child luring offences cause grave harm to victims, and there is a compelling need for denunciation and deterrence. When the gravity of the offence is properly assessed, a fit sentence for any reasonably foreseeable offender will always include at least some period of incarceration. If there are cases where the fit sentence is found to be less than six months, those cases are rare, and the difference is not grossly disproportionate.

PART III – STATEMENT OF ARGUMENT

4. This Court's recent decisions in *Hills* and *Hilbach* provide important guidance in understanding the types of offences for which mandatory minimum sentences may be constitutionally permissible. Mandatory minimum sentences are problematic when applied to offences that can be committed in a wide range of circumstances by a wide range of offenders, including circumstances that are all but innocuous and offenders who are all but morally blameless. Even if some versions of the offence are very serious, a mandatory minimum sentence is inappropriate because it is likely to impose grossly disproportionate penalties in at least some cases.[2] For those offences, a mandatory minimum sentence is unlikely to survive constitutional scrutiny.

5. In contrast, mandatory minimum sentences may be permissible for offences that are more narrowly targeted. As *Hilbach* explains, offences in this category:

> … are framed in such a way that they cannot be committed in innocuous circumstances by offenders who are all but morally blameless. On the contrary, they are almost always serious and committed by offenders who bear a high degree of moral blameworthiness. Offences that come within this class are narrowly defined and limited in scope, subject and *mens rea*. They regularly involve acts of violence, threats of violence, or conduct that is inherently dangerous, in circumstances that give rise to a real risk of death or serious bodily harm. Additionally, they require a high level of moral blameworthiness on the part of offenders, be they principals or parties, to sustain a conviction.[3]

6. Offences in this category are more likely to survive section 12 scrutiny, so long as the mandatory minimum imposed is not grossly disproportionate to conduct that could reasonably be expected to fall within their ambit.[4]

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[2] *R v Hilbach*, 2023 SCC 3 at para 2
[3] *R v Hilbach*, 2023 SCC 3 at para 3
[4] *R v Hilbach*, 2023 SCC 3 at para 4

7. Child luring fits into this second category. In Alberta's respectful submission, the guidance from *Hills* and *Hilbach* confirms that the minimum sentence at issue in this appeal does not infringe section 12.

The Gross Disproportionality Analysis

8. The section 12 analysis of a mandatory minimum sentence provision involves two steps. The first step is to decide the fit sentence for the offender before the court, or, if the court is considering a hypothetical, to decide the fit sentence for the hypothetical offender. The second step is to consider whether the impugned provision requires a sentence that is grossly disproportionate to the sentence identified in the first step.[5] Although in theory there might be no disparity, in practice "some mismatch or disproportion is very likely."[6] A court that hears a section 12 challenge to a mandatory minimum sentence must therefore assess the disparity, and determine whether "the difference between the fit sentence and the mandatory minimum sentence [is] so grossly disproportionate that it violates human dignity such that it amounts to cruel and unusual punishment".[7]

9. In assessing whether the difference is grossly disproportionate, there are three groups of factors to consider:

(1) the scope and reach of the offence;

(2) the effects of the penalty on the offender; and

(3) the penalty, including the balance struck by its objectives.[8]

10. Weighing these factors, as guided by this Court's recent rulings, leads to the conclusion that the six-month mandatory minimum sentence for child luring does not infringe section 12 of the *Charter*.

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[5] *R v Hills*, 2023 SCC 2 at para 40-41
[6] *R v Hills*, 2023 SCC 2 at para 46
[7] *R v Hills*, 2023 SCC 2 at para 47
[8] *R v Hills*, 2023 SCC 2 at para 122

Scope and Reach of the Offence

11. In general terms, the broader the offence, the greater the risk that a minimum sentence will infringe section 12. *Hills* explains that the wider the scope of the offence, the more likely there will be circumstances where the mandatory minimum imposes a substantial sentence on conduct that involves minimal risk to the public and little moral fault. In such a circumstance, the sentence is likely to be imposed for conduct that does not merit the minimum.[9] A court must assess the extent to which the offence's *mens rea* and *actus reus* capture a range of conduct, as well as the degree of variation in the offence's gravity and the offender's culpability. In characterizing the offence's scope, a court may consider whether the offence necessarily involves harm to a person or simply the risk of harm, whether there are ways of committing the offence that pose relatively little danger, and to what degree the offence's *mens rea* requires an elevated degree of culpability of the offender.[10]

12. The child luring offence does capture a wide range of conduct, but the scope of the offence is significantly curtailed by the specific and narrow *mens rea* requirement. It is only an offender who subjectively foresees that their acts will facilitate a sexual offence against a child, and proceeds to commit the *actus reus* with the intent to achieve that outcome, who will be subject to the minimum penalty. In Alberta's submission, the narrow *mens rea* is essential to justifying the minimum sentence.

13. The specific *mens rea* requirement ensures an elevated degree of culpability for the offender. In order to be convicted, the offender must subjectively believe they are speaking with a real victim, and believe (or be in a state of willful blindness) that the victim is a child. Therefore, from the offender's perspective at least, there is always a risk of harm. The only way to commit the offence that "pose[s] relatively little danger"[11] is in the context of a police sting operation.

14. Actual harm to a victim is not an element of the child luring offence. Although child luring – and the offences that luring facilitates – cause significant harm to many victims in

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[9] *R v Hills*, 2023 SCC 2 at para 125
[10] *R v Hills*, 2023 SCC 2 at para 129
[11] *R v Hills*, 2023 SCC 2 at para 129

Canada, the minimum applies whether or not harm is proved. Alberta submits that the six-month minimum sentence is justifiable without proof of harm. In cases where actual harm is proved against a child victim, appropriate sentences will substantially exceed six months.

15. Moreover, an "actual harm" requirement for child luring would be impractical and largely render the provision ineffective. This is for three reasons. First, in many cases of sexual violence against children it is impossible to determine whether or how a child has been harmed at the time of sentencing, and actual harm may not materialize until years later.[12] Second, a requirement to prove actual harm would tend to subject victims to demeaning inquiries about whether their psychological trauma was legitimate, and whether it was caused by the offence or by some other circumstances in their life. Third, Parliament designed the child luring offence to enable police sting operations. The offence contemplates that an offender may be convicted even where the intended victim is an undercover police officer. This allows police to pre-emptively detect and apprehend would-be child predators before they victimize a child. These operations would be impossible if the offence required proof of actual harm.

16. Although not every instance of luring causes actual harm, every offender knows that actual harm is foreseeable. As this Court wrote in *Friesen,* "child luring should never be viewed as a victimless crime."[13]

17. In *Hills,* this Court observed that "courts may expect harsher punishment to attach to offences that result in serious harm or include a grave *mens rea*."[14] As an example, the Court referred to *Goltz*, where a provincial legislature imposed a seven-day minimum jail sentence for driving while prohibited. The justification for the minimum was in part that the offence caused grave harm. Even though not every driver who drove while prohibited caused actual harm, the

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[12] *R v Friesen*, 2020 SCC 9 at paras 79-86; notably, at paragraph 82 of this passage the Court observed that actual harm to victims is a reasonably foreseeable consequence of sexual violence, even in those cases where all interactions occur online.

[13] *R v Friesen*, 2020 SCC 9 at para 94

[14] *R v Hills*, 2023 SCC 2 at para 130

overall harm to society that resulted from prohibited driving was substantial.[15] Precisely the same reasoning applies to the offence of child luring.

18. A useful comparator for the child luring offence may be drawn from *Hilbach,* where a majority of this Court upheld the constitutionality of robbery with a firearm. Like that offence, child luring involves "conduct that poses a significant risk to the safety of victims and the public."[16] Luring not only creates a risk of sexual violence against children – it requires that the offender act with the specific intent to facilitate sexual violence. Like robbery with a firearm, there is admittedly some breadth to the circumstances in which the child luring offence may be committed. However, like in *Hilbach*, that breadth is "appropriately reflected in differing sentencing outcomes above the minimum."[17] Finally, like robbery with a firearm, there is a "thread that connects each case".[18] The thread that connects all offences of child luring is the subjective foresight of a sexual offence against a child, combined with the choice to act with intent to facilitate that outcome.

19. The first grouping of factors supports the constitutionality of the six-month mandatory minimum sentence.

Effects of the Penalty on the Offender

20. The second group of factors requires the court to evaluate the effect of the additional punishment imposed by the minimum in excess of the otherwise fit sentence. Naturally, the greater the disparity between the fit sentence and the minimum, the more likely the minimum will be found to impose grossly disproportionate sanctions.

21. There is no question that any jail sentence is likely to have a significant effect on an offender. As explained in *Hills*, "Imprisonment is the harshest form of punishment in Canada … Incarceration entails not only a complete removal of an offender's liberty, it also has a ripple effect that touches nearly every aspect of the offender's life and physical and mental health,

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[15] *R v Goltz* [1991], 3 SCR 485
[16] *R v Hilbach*, 2023 SCC 3 at para 6
[17] *R v Hilbach*, 2023 SCC 3 at para 57
[18] *R v Hilbach*, 2023 SCC 3 at para 57

employability, children, and community."[19] However, it is not merely the impact of the total sentence that must be weighed – it is the impact of the portion that exceeds the fit sentence that would otherwise be imposed.

22. In the case of a six-month sentence for child luring, any disparity will be minimal. In Alberta's submission, six months or more will be a fit sentence for virtually all child luring offences. Following *Friesen,* there are few if any reasonably foreseeable circumstances in which a sentence less than six months would be fit. As this Court wrote:

> … sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.[20]

23. Even if there are scenarios where a sentence below six months is fit, those scenarios will inevitably call for at least some period of incarceration. Some jail will always be appropriate. This is an important consideration: "mandatory minimum sentences are necessarily more vulnerable when they replace a probationary sentence with lengthy prison terms."[21] Even if the six-month mandatory sentence may lengthen the period of jail that some offenders serve, it does not replace a probationary sentence with a jail sentence.

24. For these reasons, Alberta submits that any additional periods of incarceration that may be imposed as a result of the impugned provision will be small. Most offenders ought to receive sentences in excess of six months regardless of the mandatory minimum.

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[19] *R v Hills*, 2023 SCC 2 at para 101 (citations omitted)
[20] *R v Friesen*, 2020 SCC 9 at para 5 (emphasis added)
[21] *R v Hilbach*, 2023 SCC 3 at para 75; also see *R v Hills*, 2023 SCC 2 at paras 143-144

The Penalty and its Objectives

25. In considering the third group of factors, courts are directed to assess the severity of the mandatory sentence to determine whether and to what extent the minimum sentence goes beyond what is necessary to achieve Parliament's sentencing objectives. In making this assessment, the court should have regard to the legitimate purposes of punishment and the adequacy of possible alternatives.[22]

26. Denunciation and deterrence are valid sentencing principles.[23] Denunciatory sentences express a collective statement that the offender's conduct should be punished for encroaching on society's basic code of values, and the need for denunciation is closely tied to the gravity of the offence. Where the consequences of the offence clearly offend Canadians' basic values and call for a strong condemnation, this Court has afforded Parliament greater deference in enacting mandatory minimum penalties.[24]

27. This is the case with the offence of child luring. The mandatory minimum of six months captures conduct which, when paired with the requisite mental element, clearly warrants deterrence and denunciation. In *Morrisey*, this Court held that Parliament was entitled to enact minimum sentences that signal that use of firearms in a manner that disregards the life and safety of others is "simply not acceptable".[25] For child luring, the minimum sentence conveys an equally important message: communicating electronically with a child, for the purpose of facilitating a sexual offence against that child, is a grave offence that mandates a harsh punishment.

28. The objectives of denunciation and deterrence apply in most cases, but are "particularly relevant to offences that might be committed by ordinarily law-abiding people. It is such people, more than chronic offenders, who will be sensitive to harsh sentences."[26] This statement is

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[22] *R v Hills*, 2023 SCC 2 at para 138, citing *R v Smith*, [1987] 1 SCR 1045 at pp 1099-1100
[23] *R v Hills*, 2023 SCC 2 at para 139
[24] *R v Hills*, 2023 SCC 2 at para 139, citing *R v M.(C.A.)*, [1996] 1 S.C.R. 500 at para 81, *R v Morrisey*, 2000 SCC 39 at para 47; *R v Hilbach*, 2023 SCC 3 at para 70 citing *R v M.(C.A.)*, [1996] 1 S.C.R. 500 at para 81, *R v Ipeelee*, 2012 SCC 13 at para 37
[25] *R v Hilbach*, 2023 SCC 3 at para 71, citing *R v Morrisey*, 2000 SCC 39 at para 47 (emphasis from *Morrisey*)
[26] *R v Lacasse*, 2015 SCC 64 at para 73, citing *R v Proulx*, 2000 SCC 5 at para 129

relevant to the section 12 analysis for child luring. Although not everyone who commits luring is necessarily a first offender, the offenders for whom a six-month jail sentence might be viewed as harsh typically do not have a record of related offences. These are the very same offenders who are most likely to be effectively deterred by the mandatory minimum sentence.

29. For the offence of child luring, as with robbery with a firearm in *Hilbach*, Parliament's choice to impose the strong moral condemnation signaled by a mandatory prison sentence is reasonable, because the offender's choice to put public safety at risk offends basic moral values. Greater deference to Parliament's decision to enact the mandatory minimum is therefore warranted.[27]

30. The assessment of Parliament's policy objectives should also recognize the compelling importance of protecting children from Internet crime. It is trite to say that the modern Internet offers tremendous benefits for children. It is also trite to recognize that the Internet can be dangerous.

31. The Internet, for most people, is "first and foremost a network of information and a means of connecting with others."[28] Many adolescents use the Internet to form and strengthen social connections. However, adolescence is also a time when many children begin to explore their developing interest in sexuality. As this Court noted in *Levigne*, there are "predatory adults who, generally for illicit sexual purposes, troll the Internet to attract and entice vulnerable children and adolescents."[29]

32. These concerns are compounded by the reality that Internet luring is difficult for police to detect and investigate. Online offenders may act with great ingenuity to hide their tracks and protect their identities. As this Court noted in *Ramelson*, "Some of the most pernicious crimes are the hardest to investigate."[30] The Court went on to explain:

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[27] *R v Hilbach*, 2023 SCC 3 at para 107
[28] *R v Ramelson*, 2022 SCC 44 at para 43
[29] *R v Levigne*, 2010 SCC 25 at para 24
[30] *R v Ramelson*, 2022 SCC 44 at para 1

> Some offences, too, are hard to investigate: whether because they are "consensual"; because they "victimize those who are reluctant or unable to report them"; or because they may "lead to such great harm that they must be actively prevented".[31]

33. These words apply with particular force to child luring. Victims typically will not initially perceive the luring communications as wrongful. Afterwards, many victims refrain from reporting the crime – in some cases because of feelings of shame and guilt; in some cases because of threats made by the offender; and in some cases because they are not confident that the justice system will take them seriously.

34. Like other electronic communications, luring can occur in plain sight. The majority in *Marakah* alluded to this fact in the context of text messages: "One can even text privately in plain sight. A wife has no way of knowing that, when her husband appears to be catching up on emails, he is in fact conversing by text message with a paramour. A father does not know whom or what his daughter is texting at the dinner table."[32]

35. The difficulty in detecting and apprehending offenders reinforces the logic of imposing a mandatory penalty. In *Goltz,* the seven-day sentence for prohibited driving was upheld in part on the basis that the offence was difficult to detect. This Court observed that the BC legislature was legitimately concerned that sentences for prohibited driving be geared in significant part to the continued welfare of the public through deterrent and protective aspects of punishment.[33] Since the offence was difficult to detect, there was a great temptation on the part of many prohibited drivers to commit it. In these circumstances, to protect public safety, it was rational for a legislature to determine that for the purpose of deterrence a serious penalty must attach to it.[34]

36. In response to the challenges posed by Internet luring, Parliament adopted a "particularly proactive approach".[35] Child luring and related offences "reflect Parliament's own judgment about when such conversations cross a line, and suggests there is a legitimate law enforcement

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[31] *R v Ramelson*, 2022 SCC 44 at para 33, citing *R v Ahmad*, 2020 SCC 11 at para 18
[32] *R v Marakah*, 2017 SCC 59 at para 36
[33] *R v Goltz*, [1991] 3 S.C.R. 485 at para 38
[34] *R v Goltz*, [1991] 3 S.C.R. 485 at para 51
[35] *R v Ramelson*, 2022 SCC 44 at para 88

interest in the police intervening at a relatively early stage."[36] The legislative scheme is appropriately calibrated to denounce and deter offenders who commit a serious crime, at grave risk to public safety, and are proved to have a narrow, specific *mens rea*. The mandatory minimum sentence of six months does not impose grossly disproportionate sentences.

Conclusion

37. There is no scenario in which a sentence of six months jail will be grossly disproportionate for a person who intentionally communicates with a child for the purpose of facilitating a sexual offence against that child. Incarceration is always a serious deprivation of liberty, no matter the length – but when an adult attempts to facilitate the sexual abuse of a child, any sanction less than a serious deprivation of liberty is manifestly inadequate.

38. Alberta submits that Parliament's objectives in imposing the mandatory minimum sentence were valid and important. The six-month minimum is not out of sync with the sentences that would be imposed in its absence, and in fact most offenders convicted of child luring ought to receive sentences well in excess of the minimum. In those rare cases where six months jail exceeds what would otherwise be a fit sentence, the variation is not so excessive as to outrage standards of decency.

39. This Court should set aside the declaration of invalidity, and hold that the mandatory minimum sentence of six months imprisonment under *Criminal Code* section 172.1(2)(b) does not infringe section 12 of the *Charter*.

[36] *R v Ramelson*, 2022 SCC 44 at para 88

PART V – ORDER SOUGHT

40. This Court should hold that the mandatory minimum sentence of six months imprisonment under *Criminal Code* section 172.1(2)(b) does not infringe section 12 of the *Charter*. It should set aside the declaration that the mandatory minimum sentence is of no force or effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 31st day of January, 2023.

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PART VII – TABLE OF AUTHORITIES AND LEGISLATION

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