File No. 39935

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

HIS MAJESTY THE KING and ATTORNEY GENERAL OF QUÉBEC

APPELLANTS (Appellants)

-and-

BERTRAND MAXIME MARCHAND

RESPONDENT (Respondent)

-and-

DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF ONTARIO ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN, NUNAVIK CIVIL LIBERTIES ASSOCIATION, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE, BARBARA SCHLIFER COMMEMORATIVE CLINIC and INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

INTERVENERS

File No. 40093

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC and HIS MAJESTY THE KING

APPELLANTS (Appellants)

-and-

H.V.

RESPONDENT (Respondent)

-and-

DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE, and INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

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PART I – OVERVIEW

1. The *Charter* belongs to all people in Canada. For that reason, the constitutionality of mandatory minimum sentences are not considered solely on the basis of the offender before the court, but based on an analysis of the reasonably foreseeable scope of the law.[1] Defining its outer limits allows the Court to analyze "who might suffer what consequences as the result of a challenged provision."[2] In so doing, this approach furthers access to justice by upholding the rights of those claimants who do not have the means to mount a constitutional challenge themselves.

2. As confirmed in *R. v. Boudreault*, any s. 12 analysis should consider the reasonably foreseeable characteristics of offenders who "appear with staggering regularity in our provincial courts."[3] *R. v. Hills* built upon this approach, affirming that characteristics like age, poverty, race, Indigeneity, mental health issues and addiction "should not be excluded from consideration", since they are overrepresented in Canada's criminal justice system.[4]

3. The Independent Criminal Defence Advocacy Society ("CDAS") asks the Court to affirm that such characteristics ought to be consistently incorporated in the s. 12 analysis as reasonably foreseeable offenders. Further, with respect to the particular mandatory minimums before the Court, it is submitted that the reasonable hypotheticals should include people who are cognitively impaired and youthful offenders who are close in age to the victim. Such individuals are more than theoretically possible – due to the nature of child luring offences, they may reasonably be expected to arise as a matter of common sense.

4. When those offenders are considered, along with the broad range of conduct that may qualify as child luring, it is clear that ss. 172.1(2)(a) and (b) casts far too great a net, imposing a penalty on some that would be "so excessive as to outrage standards of decency."[5] They amount, in other words, to cruel and unusual punishment, and cannot be justified under s. 1.

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[1] *R. v. Hills,* 2023 SCC 2 at paras. 68-75.
[2] *R. v. Boudreault,* 2018 SCC 58 at para. 55.
[3] *Boudreault* at para. 55.
[4] *Hills* at para. 86.
[5] *Boudreault*, at para. 45; *R. v. Lloyd*, 2016 SCC 13 at para. 24.

PART II – ARGUMENT

5. CDAS's submissions will proceed in three parts. First, it will be argued that personal characteristics that are overrepresented in the criminal justice system ought to be consistent staples in the reasonable hypothetical stage of the s. 12 analysis. Second, it will propose two reasonable hypotheticals that are specific to child luring: offenders with cognitive impairments, and youthful offenders who are close in age to the victims. Third, it will explain why the child luring provisions capture a wide range of conduct and culpability, rendering them constitutionally infirm.

A. Personal characteristics that are overrepresented in the criminal justice system ought to be consistently considered as reasonable hypotheticals

6. An inquiry into reasonable hypotheticals is "grounded in judicial experience and common sense."[6] Personal characteristics are relevant considerations so long as they are not tailored to create remote or far-fetched examples.[7] As a matter of common sense, marginalized populations that are overrepresented in the justice system are "reasonably expected to arise" in the everyday operation of our courts.[8] Therefore, in *Hills,* Martin J. recognized that "[a]s a rule, characteristics that are reasonably foreseeable for offenders in Canadian courtrooms, like age, poverty, race, Indigeneity, mental health issues and addiction, should not be excluded from consideration."[9]

7. It is submitted that overrepresented characteristics should not just be permissible considerations; they should figure prominently and consistently in the assessment of a law's constitutionality under s. 12 of the *Charter*. Only then will reasonable hypotheticals capture the realities of Canada's criminal justice system, and in particular, the experiences of those who are most often caught within its grasps.

8. Further, although courts must be cautious not to construct the most innocent and sympathetic case imaginable, it is not uncommon for layers of disadvantage to intersect, compounding to form an individual or group's experience. It is critical that s. 12 inquiries are alive

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[6] *R. v. Nur,* 2015 SCC 15 at paras. 62, 74.
[7] *Hills* at paras. 86-87.
[8] *R. v. Hilbach,* 2023 SCC 3 at para. 43.
[9] *Hills* at para. 86.

to the intersectionality of disadvantage.

9. This is not a novel approach in the context of s. 12. For example, in *Boudreault,* the Court considered a reasonable hypothetical offender, Mr. Michael, who was an Inuit man who lived in serious poverty, had a precarious housing situation, struggled with addiction, grew up under child protection, and had physical disabilities.[10] In other words, multiple bases of disadvantage intersected to help shape Mr. Michael's pathway toward crime, and Martin J. recognized that his personal circumstances are representative of many people in the everyday courtroom.[11] Thus, when considering over-represented populations within the context of s. 12, it is not necessarily "far-fetched" nor "remote" to consider intersecting grounds of disadvantage, so long as it is tethered to the reality unfolding in our justice system.

10. Further, to understand the true impact of a sanction on an individual's dignity – and therefore the extent it is proportionate to the gravity of the offence and an offender's moral culpability – a s. 12 analysis must account for how facially neutral sanctions, applied indiscriminately, can have an aggravated impact on marginalized offenders. It is now well recognized that penalties can be comparatively harsher for marginalized offenders.[12] The majority acknowledged this reality in *R. v. Hilbach* with respect to Indigenous offenders:

> Indigenous offenders are more severely affected by incarceration and are often treated in discriminatory ways in custodial environments. Indigenous people are more likely to experience use-of-force incidents in federal penitentiaries and are provided limited access to culturally appropriate programming (Office of the Correctional Investigator, *Annual Report 2021-2022* (2022)). Further, incarceration itself is often a culturally inappropriate consequence for wrongdoing for Indigenous offenders (*Gladue*, at para. 68).[13]

11. The disproportionate impact of a punishment on marginalized offenders only increases the likelihood that a mandatory minimum could inflict cruel and unusual punishment. Thus, it is essential that such offenders feature prominently in the s. 12 analysis.

12. Serious consequences flow from a failure to consistently consider the characteristics of

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[10] *Boudreault* at paras. 52-54.
[11] *Boudreault* at para. 55.
[12] *Hills* at para. 135; see also *Ewert v. Canada,* 2018 SCC 30, at para. 53.
[13] *Hilbach* at para. 62.

massively over-represented groups in reasonable hypotheticals. Not only does it unfairly protect minimum sentences from constitutional scrutiny, a tool which contributes to the over-representation of persons in these groups;[14] it perpetuates systemic discrimination in the criminal justice system by failing to acknowledge the lived experiences of marginalized people.[15] A robust approach to the analysis of the constitutionality of these provisions prevents the application of these laws to those very individuals who may be less morally blameworthy and for whom a resulting sentence is most likely to be grossly disproportionate.

B. An analysis of ss. 172.1(2)(a) and (b) must consider the impact on individuals with cognitive impairments and individuals close in age to their victims

13. In addition to the above-noted marginalized offenders, two examples of reasonably foreseeable offenders whose conduct is caught by ss. 172.1(2)(a) and (b) include those who are cognitively impaired, as well as individuals who are close in age to the victims. In *R. v. Morrison,* 2019 SCC 15, Justice Karakatsanis recognized that these offenders may reasonably arise in the context of child luring. She stated:

> [183] The offender's personal circumstances and relationship with the victim can also vary greatly. Case law shows that luring offences are sometimes committed by individuals who do not have a large age difference with their victims, who have cognitive impairment or mental illness, or who have themselves been assaulted (see, e.g., *R. v. Hood*, 2018 NSCA 18, 409 C.R.R. (2d) 70; *R. v. S. (S.)*, 2014 ONCJ 184, 307 C.R.R. (2d) 147; *R. v. Crant*, 2017 ONCJ 192). These factors can mitigate the moral culpability associated with the offence (see section 718.1 of the *Criminal Code*).[16]

14. CDAS submits that these characteristics ought to feature in the Court's consideration of the reasonably foreseeable application of s. 172.1 of the *Criminal Code*.

i. *Individuals with cognitive impairments*

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[14] Terry Skolnik, Criminal Justice Reform: A Transformative Agenda, 2022 59-3 *Alberta Law Review* 631, at p. 652; Marie Manikis, The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-representation of Aboriginal People in Prisons, 2015 71 *Supreme Court Law Review* 277 at p. 280; Asad G Kiyani, R. v. Lloyd and the Unpredictable Stability of Mandatory Minimum Litigation, 2017 81 *Supreme Court Law Review* 117 at p. 139.

[15] Kiyani, *supra* note 15 at pp. 140-141.

[16] *R. v. Morrison,* 2019 SCC 15*,* para. 183.

15. Neurocognitive impairment and neurodevelopmental disorders impair the functioning of the brain and can constrain a person's opportunities for positive development. Such conditions may mitigate an offender's moral blameworthiness where it undermines their capacity to restrain urges and impulses; to appreciate that their acts were morally wrong; and to comprehend the link between the punishment imposed by the court and the crime for which they are convicted.[17] In such cases, the principles of deterrence and denunciation assume less weight.[18] Instead, the focus tends to be on an offender's rehabilitation.[19]

16. The case-law contains many examples of individuals with cognitive impairments who are charged and convicted of child luring.[20] Considering offenders with cognitive impairments will better illustrate the range of real-life conduct captured by this offence.[21] For some of those individuals, the sentencing provisions impose grossly disproportionate sentences, particularly where rehabilitation would otherwise play a central role in a proportionate punishment.

17. Cognitive impairments were considered in a s. 12 analysis of s. 172.1(2)(b) in *R. v. Hems*, 2019 ONCJ 779. The accused in that case was a youthful first time offender who was suffering from complex developmental delays and cognitive difficulties. He met a 11-year-old girl while playing an online video game and subsequently sent sexually explicit messages. The Court described Mr. Hems' personal circumstances as follows:

> [36] The challenge to the mandatory term of imprisonment is not that Adam Hems does not present a high risk of sexually reoffending but that his "complex developmental delays and cognitive difficulties" makes a mandatory custodial sentence cruel and unusual because his hyper-sexualized behavior is not of his making, and he lacks the cognitive skills or capacity to manage his behaviour

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[17] *R. v. Ramsay,* 2012 ABCA 257 at paras. 24-25, 45; *R. v. J.E.D.*, 2018 MBCA 123 at para. 73 per Steel J.A.; *R. v. Scofield,* 2019 BCCA 3, at paras. 41-41; *R. v. Sellars,* 2021 BCPC 231 at para. 51; *R. v. Smith,* 2014 NSPC 72 at para. 22.
[18] See e.g. *R. v. Harper*, 2009 YKTC 18 at para 43, 65 CR (6th) 373; *Ramsay*, at para 25.
[19] *R. v. Kagan*, 2008 NSSC 26 at para 22; *R v Somogyi*, 2011 ONSC 483 at para 34; and *Scofield*.
[20] See e.g. *R. c. Osadchuk*, 2020 QCCQ 2166; *R. v. N.M.G.*, 2020 ONCJ 146; *R. v. Sinclair*, 2022 MBCA 65; *R. v. Fawcett*, 2019 BCPC 125; *R. v. McPhee*, 2020 ABPC 106; *Scofield*.
[21] *Nur* at para. 72.

> without external supports and resources, and those have either not yet been made available to him or denied.

18. Although the mandatory minimum was not grossly disproportionate for Mr. Hems, who had a high risk of reoffending, Bliss J. concluded that it could be on a reasonably foreseeable offender with cognitive impairments:

> [74] It is not far-fetched to imagine an individual who is socially isolated, because of cognitive challenges or intellectual impairments, who operates at a more child-like level, and whose use of the internet is his or her primary source of interaction with the world at large, engages in sexually explicit conversation with a teenager, albeit one under 16 years. His or her actions would be captured by the section and the mandatory custodial sentence that must follow.

19. Bliss J. also recognized that the impact of a carceral sentence on a cognitively impaired person may be more severe, with the effects including "the individual not being able to cope with the lack of 'support' in prison nor deal with the harsh realities of a prison environment."[22] Ultimately, the six month prison sentence amounted to cruel and unusual punishment where "the offender, while intentionally engaged in such conduct is someone who is developmentally delayed with significant intellectual challenges."[23]

20. It is submitted that *Hems* offers an excellent template for how to approach the s. 12 analysis in this case, as well as an example of why the child luring penalties are constitutionally infirm. CDAS asks the Court to consider adopting Bliss J.'s approach.

ii. ***Offenders close in age to the victim***

21. CDAS further asks the Court to consider the situation of a youthful offender who is close in age to the victim.

22. It is well recognized that youthful offenders have reduced moral culpability compared to their adult counterparts and this may include offenders who are just beyond the cusp of adulthood.[24] They are entitled to different treatment under the law since "age plays a role in the

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[22] *R. v. Hems,* 2019 ONCJ 779 at para. 73.
[23] *Hems* at para. 75; see also *Fawcett*.
[24] See, for example, *R. v C.*, 2019 NSPC 82 at para. 34.

development of judgment and moral sophistication," and youthful offenders are still more likely to be immature, impulsive and lack judgment.[25] Accordingly, rehabilitation is a primary sentencing objective with such offenders.[26]

23. While youthful offenders may not be overrepresented in the criminal justice system at large, child luring case-law is replete with examples where there is a limited age gap between the offender and the victim.[27] This prospect was highlighted by Moldaver J. in *Morrison,* where he observed that "s. 172.1's scope encompasses situations potentially ranging from a single text message sent by a 21-year-old young adult to a 15-year-old adolescent, to those involving numerous conversations taking place over weeks or months between a middle-aged mature adult and a 13-year-old child."[28] The relative harm posed by either situation differs dramatically: as the age disparity increases, so too does the imbalance of power, the level of exploitation, and potential for harm.[29] In this sense, the wide range of conduct renders the mandatory minimum constitutionally vulnerable.

24. The law already accounts for this range of culpability to some extent with respect to other sexual offences, with the statutory "close-in-age" exceptions.[30] For instance, a fourteen or fifteen-year-old can consent to sexual activity as long as the partner is less than five years older and there is no relationship of trust, authority or dependency or any other exploitation of the young person. But notably, this means that a fifteen-year-old could have sexual relations with a nineteen-year-old, but sexual relations with someone just days older could be illegal. Although Parliament had to draw a line somewhere, it is difficult to fathom how, with the passage of a few days, so great an incipient level of criminality would be inherent in a person's conduct as to justify a minimum penalty of imprisonment.

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[25] *R. v. D.B.,* 2008 SCC 25 at paras 60-64.
[26] See for eg., *R. v. Sugden,* 2021 YKTC 61 at para. 16; *R. v. Zhang,* 2018 BCPC 306 at paras. 58-59.
[27] See e.g. *R. v. Bains,* 2022 ABCA 227; *R. v. J.J.S.*, 2014 YKYC 2; *R. v. Himes*, 2016 ONSC 249.
[28] *Morrison* at para. 146.
[29] Isabel Grant and Janine Benedet, "Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law" (2019) *Canada Bar Review* 97:1, at p. 12.
[30] See s. 150.1(2) and (2.1) of the *Criminal Code.*

25. The same issue arises here, where communications for a sexual purpose could be legal one day, but illegal the next when one party turns eighteen.[31] While that cannot excuse predatory behaviour or legalize conduct that is otherwise illegal, it offers important context for discerning a proportional punishment.

26. The fine line between teenage offenders and young adults can typically be accounted for in sentencing through the exercise of a judge's discretion. This occurred, for example, in *R. v. C.*:

> Restraint must receive additional effect in this case for a very important reason: SMNC was 18 years of age when he committed his acts. Indeed, had he done what he did two months earlier, he would have been before the court as a young person, and in circumstances that would have rendered the legality of a custodial sentence the subject of legitimate controversy, given the limitations on the imposition of custodial sentences in § 39 of the *Youth Criminal Justice Act (YCJA)*. The law recognises the diminished moral responsibility of young persons in proceedings under the *YCJA*: *R v DB*, 2008 SCC 25 at ¶ 1; *R v CNT [BMS]*, 2016 NSCA 35 at ¶ 29; *R v BP*, 2015 NSPC 38 at ¶ 8. I believe it would be a simplism to believe that, once a young person breaks the close into adulthood, some sort of heterochronic gene is going to kick in at once and suddenly instill adult judgment into what remains essentially an adolescent human mind. The law recognizes the jump principle in individual cases, which would see sentences for the repetition of criminal conduct increasing gradually, rather than in large leaps: *R v Mauger*, 2018 NSCA 41 at ¶ 66. It seems to me that the jump principle is at work in the larger sentencing project, and the transitioning from youth to adult should not witness big spikes in penal liability, and ought not crush the prospects of rehabilitation: *R v Cater*, 2012 NSPC 38 at ¶ 47.[32] [Emphasis added.]

27. Similarly, courts have held that that "the transition from statutorily defined young person to adult should not be marked by an immediate abandonment of rehabilitation as the primary goal in cases where the prospect of successful rehabilitation is real."[33]

28. Mandatory minimums preclude a sentencing judge from meaningfully taking youthfulness or their prospects for rehabilitation into account. Parliament's selection of eighteen as a legal marker of adulthood is entitled to deference, but any punishments imposed as a result must still accord with s. 12 of the *Charter.* It is submitted that the child luring mandatory minimums may

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[31] The close-in-age defence does not apply to s. 172.1 of the *Criminal Code.*
[32] *R v C* at para. 34.
[33] *R. v. Leask* (1996) 112 C.C.C. (3d) (MBCA) at p. 402.

not withstand constitutional scrutiny where they are imposed on a youthful offender whose conduct lies on the lesser end of the spectrum.

29. The gross disproportionality of a six month or one year prison sentence would only be more acute with a youthful offender suffering from other intersecting layers of disadvantage, like racial discrimination or physical disability. This is permissible to consider because reported cases are a starting point to which "additional circumstances can be added…to test the severity of the punishment."[34]

30. It is submitted that such examples expose the constitutional frailty of s. 172.1, and ought to be accounted for in the Court's decision in these appeals.

C. The Child Luring Provisions Capture a Wide Scope of Offenders and Conduct

31. Finally, CDAS submits that the child luring provisions capture a wide range of conduct and culpability, rendering them constitutionally circumspect.[35]

32. On one end of the spectrum, they capture adult predators who intentionally lure children on the internet to sexually exploit their vulnerabilities. These individuals are morally blameworthy and properly subject to a sentence at or even well above the minimum imposed by these provisions.

33. At the middle end of the range are individuals who may possess some of the elements noted above, or whose conduct is less pointed and purposeful. For these individuals the mandatory minimum custodial sentences imposed may be disproportionate, but not grossly so.

34. On the lowest end of the spectrum, they capture a youthful offender who sends one text message to a fifteen year old. They also capture a young adult who operates at a more child-like level and does not understand the gravity of their actions due to cognitive impairments. In either case, the moral culpability of the offender is diminished. And where communications are in the early stages of luring, or where there is no explicit or implicit sexual content to the conversations, there is a limited risk of harm flowing from the conduct. The minimum custodial sentence would

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[34] *R. v. Morrisey,* 2000 SCC 39 at paras. 30-33.
[35] *Nur* at para. 82, *Lloyd* at para. 27.

be grossly disproportionate in the circumstances.

35. While all these offenders may be guilty of child luring and subject to a mandatory minimum penalty, there is no question that their moral culpability and the gravity of their offences varies considerably. The wide scope of offenders and conduct captured by these laws renders them unconstitutional. A cruel and unusual punishment should not be saved under s. 1.

D. Conclusion

36. Any s. 12 analysis should consider reasonable hypotheticals that incorporate the features of individuals who are disproportionately convicted of the offence at issue. An assessment of the constitutionality of the mandatory minimum sentence for child luring should consider reasonable hypotheticals that include those who are cognitively impaired, and offenders close in age to their victim. When one considers the wide range of offenders and conduct that come within the folds of s. 172.1, it is clear that the mandatory penalties run afoul of s. 12, and cannot be saved under s. 1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 2nd day of February, 2023.

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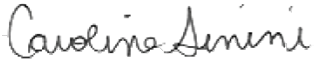

Caroline Senini
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Part VI – Table of Authorities