**SCC Court File No. 40093**

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

**B E T W E E N:**

**SA MAJESTÉ LE ROI**

APPELANTE
(Appelante)

- and -

**PROCUREUR GÉNÉRAL DU QUÉBEC**

APPELANTE
(Appelante)

- and –

**H.V.**

INTIMÉ
(Intimé)

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INTERVENANTS

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# FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF ONTARIO

**Pursuant to *Rule* 42 of the *Rules of the Supreme Court of Canada***

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## PART I – OVERVIEW OF ARGUMENT

1. In *R. v. Hills*[1] and *R. v. Hilbach*[2], this Court recently affirmed and clarified the constitutional analysis under s.12 of the *Canadian Charter of Rights and Freedoms.*[3] In this factum, the Intervenor the Attorney General of Ontario submits that the *Hills* and *Hilbach* analysis supports the conclusion that the mandatory minimum punishment under s.172.1(2)(b) of the *Criminal Code of Canada*[4] does not violate s.12 of the *Charter*.

2. The Attorney General of Ontario also submits that this Court's decision in *R. v. Friesen*[5], which made clear the life-altering harm caused by child sexual offences (including child luring[6]), requires that reasonable hypotheticals under the s.12 analysis be tailored to the harm at which the offence is targeted.

3. In addition, the Attorney General of Ontario addresses the uncertainty around the *mens rea* for child luring where a real child, rather than an undercover officer, is involved. The Attorney General of Ontario submits that this issue, which may also impact the *mens rea* for other offences such as sexual interference, need not be resolved for the purposes of this appeal. The essential elements of child luring involve a high degree of moral blameworthiness regardless of whether committed in relation to a real child or an undercover officer.

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[1] *R. v. Hills,* 2023 SCC 2.
[2] *R. v. Hilbach,* 2023 SCC 3.
[3] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 198, c. 11.
[4] *Criminal Code of Canada*, R.S.C. 1985, c. C-46.
[5] *R. v. Friesen,* 2020 SCC 9.
[6] In *R. v. Friesen, supra,* at ¶44, this Court noted that the sentencing principles outlined in that case have relevance to sentencing for child luring.

## PART II – STATEMENT OF POSITION

4. The Attorney General of Ontario submits that:

i. The mandatory minimum punishment in s.172.1(2)(b) of the *Criminal Code of Canada* does not violate s.12 of the *Canadian Charter of Rights and Freedoms*;

ii. The harmonization of this Court's decisions in *Friesen, Hills,* and *Hilbach* requires that reasonable hypotheticals be tailored to the harm at which the offence is targeted; and,

iii. This Court need not, in this case, resolve the uncertainty around the *mens rea* for child luring where a real child is involved. Whatever the resolution of that issue, the requisite *mens rea* is high and supports the constitutionality of the mandatory minimum punishment.

## PART III – BRIEF OF ORAL ARGUMENT

### A. The Mandatory Minimum Punishment in Section 172.1(2)(b) of the *Criminal Code* is Constitutional

5. As this Court explained in *Hills* and *Hilbach*, the s.12 analysis constitutes two stages. Below, the Attorney General of Ontario engages in the analysis to demonstrate that the mandatory minimum punishment under s.172.1(2)(b) of the *Criminal Code* is constitutional.

#### *i. The First Stage of the Hills / Hilbach Section 12 Analysis*

6. At the first stage of the s.12 analysis, a court is to assess what constitutes a fit and proportionate sentence for the offender before them or the reasonably foreseeable offender.[7] At this stage, a court must: (a) balance various sentencing objectives; (b) account for aggravating and mitigating factors; and, (c) ensure the sentence is proportionate to the gravity of the offence and the moral blameworthiness of the offender.[8]

[7] *R. v. Hills*, *supra,* at ¶¶40-41.
[8] *R. v. Hills*, *supra*, at ¶44, ¶50, ¶¶53-55.

**a. The Sentencing Objectives**

7. With respect to the various sentencing objectives set out in the *Criminal Code,* many of them support the imposition of lengthy sentences for luring:

i. **Section 718.01:** In *Friesen*, this Court affirmed that s.718.01 of the *Criminal Code* requires that denunciation and deterrence take precedence in the case of child sexual offences[9];

ii. **Section 718.2(a)(ii.1):** Section 718.2(a)(ii.1) requires sentencing judges to consider evidence that an offender abused a person under 18 years old;

iii. **Section 718.2(a)(iii):** Section 718.2(a)(iii) requires a court to consider whether the offender abused a position of trust in committing the offence, a consideration which is often relevant in the context of child luring in two ways: (a) children are often lured by people who already stand in a position of trust, such as a family member (as in this case) or a teacher; and, (b) where a child is lured by a stranger, the offender may develop a new relationship of trust as a form of grooming[10];

iv. **Section 718.2(a)(iii.1):** Section 718.2(a)(iii.1) provides that a court must consider that the offence had a significant impact on the victim, considering their age and other personal circumstances. As this Court made clear in *Friesen,* child sexual offences have profound physical and psychological effects on child victims that often last well into adulthood[11]; and,

v. **Section 718.04:** Section 718.04 provides that when a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances – including because the person is Aboriginal and female – the court shall

[9] *R. v. Friesen, supra,* at ¶¶101-105.
[10] *R. v. Friesen, supra*, at ¶¶125-130.
[11] *R. v. Friesen, supra*, at ¶¶51-61, ¶¶79-84.

give primary consideration to the objectives of denunciation and deterrence. In *Friesen,* this Court observed that both girls and Indigenous children experience childhood sexual violence at a disproportionate rate.[12]

8. It must, of course, be acknowledged that a countervailing sentencing objective is found in s.718.2(e) of the *Criminal Code*, which provides that with respect to all offenders, and with particular attention to the circumstances of Aboriginal offenders, a court must consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community. As this Court made clear in *Friesen,* courts must apply this sentencing principle as articulated in *R. v. Gladue* even in extremely grave cases of sexual violence against children.[13] However, it is submitted that in practical effect, Indigenous offenders will still often receive lengthy terms of imprisonment for child luring because: (i) s.718.2(e) makes it clear that a sentence must be consistent with the harm done, which this Court has recognized in *Friesen* as being significant; and, (ii) this Court held in *Gladue* that generally the more violent and serious the offence, the more likely it is that the terms of imprisonment for Indigenous and non-Indigenous offenders will be the same, albeit in *R. v. Ipeelee* this Court made clear that this is not a principle of universal application and s.718.2(e) must always be considered.[14]

**b. Aggravating and Mitigating Factors**

9. The Attorney General of Ontario submits that the following aggravating factors will often be present in the case of child luring, having the effect of increasing the appropriate sentence:

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[12] *R. v. Friesen, supra*, at ¶68, ¶70.
[13] *R. v. Friesen, supra,* at ¶92; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee,* 2012 SCC 13 at ¶¶84-85.
[14] *R. v. Gladue, supra*, at ¶79; *R. v. Ipeelee, supra,* at ¶¶84-87; *R. v. Gray,* 2021 ONCA 86 at ¶¶¶49-51.

i. **The age of the victim:** Where a child is particularly young, this will serve in aggravation of the sentence imposed, as younger children are particularly dependent and helpless without the care of their parents. Their personality and ability to recover from harm is still developing, and they will have to live with the harms of sexual violence longer than a person victimized later in life.[15] Notably, however, this Court has also stressed that courts must be careful to impose proportionate sentences even where the victim is an adolescent, and particularly an adolescent girl.[16] Adolescent girls are disproportionately targeted by sexual violence, and Indigenous adolescent girls suffer sexual violence at alarming rates.[17] Adolescent girls are extremely vulnerable in that they are beginning to assert their independence and trying to develop a healthy sexuality in a culture that continues to eroticize them.[18] Sentences imposed in these cases have historically been disproportionately low[19], likely due at least in part to the perception of adolescent girls as sexual temptresses which still persists in legal thinking[20];

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[15] *R. v. Friesen, supra,* at ¶86, ¶¶134-135.
[16] *R. v. Friesen, supra,* at ¶136.
[17] Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality, and Unintended Consequences, Professor Janine Benedet, (2019) 44:2 Queen's L.J., at p. 304 (available online: https://journal.queenslaw.ca/sites/journal/files/Issues/Vol%2044%20i2/3.%20Benedet.pdf).
[18] Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality, and Unintended Consequences, *supra*, at p. 304.
[19] *R. v. Friesen, supra,* at ¶136.
[20] Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law, Professors Isabel Grant and Janine Benedet, (2019) The Canadian Bar Review, Vol. 97, No. 1, at p. 8 (available online:https://commons.allard.ubc.ca/fac_pubs/502/).

ii. **Breach of trust or grooming:** While grooming is not an element of the offence of child luring[21], its presence is an aggravating factor on sentencing.[22] Similarly, as noted above, the abuse of a position of trust is a statutorily aggravating factor;

iii. **The duration of the luring:** It is aggravating when the luring is not committed spontaneously in a fleeting lapse of judgment, but rather carries on over an extended period of time[23]; and,

iv. **The degree of physical interference:** Where child luring results in a meeting between the offender and child, the degree of physical interference is an aggravating factor on sentencing. It reflects the degree of violation of the victim's bodily and sexual integrity. It also takes into account that certain types of physical acts may increase the risk of harm; for example, unprotected penile penetration can be aggravating because it increases the risk of disease and pregnancy. Moreover, penetration often causes pain and injury to which children's bodies are particularly vulnerable.[24] However, this Court has made clear that any sexual touching is serious, and that even mild non-consensual touching of a sexual nature can have profound implications for the victim.[25] There is no basis to assume that sexual touching without penetration can be relatively benign.[26]

10. It is also useful to clarify those considerations which do not serve in mitigation of sentence:

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[21] *R. v. Legare,* 2009 SCC 56 at ¶¶28-31; *R. v. Woodward,* 2011 ONCA 610 at ¶43; *R. v. Dragos,* 2012 ONCA 538 at ¶88.
[22] *R. v. Friesen, supra,* at ¶86, ¶153.
[23] *R. v. Saliba*, 2019 ONCA 22 at ¶28; *R. v. R.B.*, 2014 ONCA 840 at ¶11; *R. v. R.A.*, 2021 ONCA 126 at ¶21.
[24] *R. v. Friesen, supra,* at ¶139.
[25] *R. v. Friesen, supra,* at ¶142.
[26] *R. v. Friesen, supra,* at ¶144.

i. **'De facto consent':** A child's 'de facto consent' or participation in the sexual activity does not serve in mitigation of sentence, nor is it mitigating if the child initiates the sexual activity.[27] Children lack the capacity to consent[28], our criminal justice system places the responsibility on adults to ensure adult / child sexual contact does not take place[29], and harm is still caused[30];

ii. **A parent's 'consent':** A parent's 'consent' to sexual abuse should not be considered mitigating. The fact of the parent's consent demonstrates how vulnerable the child is, of which the offender took advantage, and represents a separate breach of trust[31]; and,

iii. **The absence of additional physical violence:** It is a myth that young children are not seriously harmed by sexual contact with adults in the absence of additional physical violence[32]. Child sexual offences are inherently harmful.[33]

**c. Proportionality to the Gravity of the Offence and the Degree of Blameworthiness of the Offender**

11. The fundamental principle of sentencing set out in s.718.1 of the *Criminal Code* is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the

[27] *R. v. Friesen, supra,* at ¶52, ¶¶148-154; Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality, and Unintended Consequences, *supra*, at p. 299.
[28] *R. v. Friesen, supra*, at ¶52.
[29] *R. v. Friesen, supra*, at ¶154; *R. v. George,* 2017 SCC 38 at ¶2; *R. v. W.G.*, 2021 ONCA 578 at ¶62, leave to appeal refused [2021] S.C.C.A. No. 381.
[30] *R. v. Friesen, supra,* at ¶152.
[31] *R. v. Friesen, supra,* at ¶168.
[32] Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality, and Unintended Consequences, *supra*, at p. 299.
[33] *R. v. Friesen, supra,* at ¶77.

offender. Sentencing judges must also consider parity, which requires that similar offenders who commit similar offences in similar circumstances should receive similar sentences.[34]

12. **The Gravity of the Offence:** The gravity of the offence refers to the seriousness of the offence in a general sense and is reflected in the potential penalty imposed by Parliament and in any specific features of the commission of the crime. The gravity of the offence should be measured by taking into account the consequences of the offender's actions on victims and on public safety, and the physical and psychological harms that flowed from the offence.[35]

13. The potential penalty imposed by Parliament reflects that Parliament is increasingly of the view that child luring is a grave offence. When the child luring offence was enacted in 2003, the maximum available sentence was six months' jail and no mandatory minimum punishment attached. In 2007, Parliament raised the maximum sentence to 18 months' jail, and in 2015 to two years' less a day. Parliament introduced a mandatory minimum sentence of 90 days' jail in summary proceedings in 2012, and in 2015 it raised the mandatory minimum sentence to six months' jail.

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[34] Section 718.1 of the *Criminal Code of Canada, supra*; *R. v. Friesen, supra,* at ¶¶30-31. Judges often rely on sentencing caselaw to guide them in arriving at a sentence which respects the principles of proportionality and parity. In *Hills, supra,* this Court endorsed such an approach, with the caveat that the sentencing precedents must "align with established principles and objectives of sentencing" (¶53). In the submission of the Attorney General of Ontario, this caveat is an important one where, as here, both the courts and Parliament have evolved in their understanding of the seriousness of the offence: *R. v. Friesen, supra*, at ¶5, ¶49, ¶¶96-105. It is submitted that caution should be exercised in relying on dated sentencing precedents.

[35] *R. v. Hills, supra,* at ¶58.

14. As for the question of the harm caused by child luring, this Court made clear in *Friesen* that child sexual offences are serious and have devastating consequences for victims, their families, and the community more broadly. This Court directed that the sentences imposed must reflect the normative character of the offender's actions and the consequential harms.[36]

15. The Attorney General of Ontario submits that even where an offender is charged in the context of a police sting operation, it cannot be said that no harm has materialized. Because offenders *attempt* to lure children on the internet, children and their parents may have their sense of safety in the internet shaken, which is significant given the prominent role the internet plays in children's communication, education, and entertainment. Similarly, society is required to devote resources to the investigation of those who would lure children.[37] Moreover, the conversations in which the undercover officers engage often involve the offender, *in real time*, making highly sexualized comments to someone they think is a child, or involve the offender sharing naked

[36] *R. v. Friesen, supra,* at ¶76; *R. v. T.J.*, 2021 ONCA 392 at ¶33.
[37] *R. v. Mermer*, 2015 ONSC 2715 at ¶30.

photos or even child pornography[38]: courts are beginning to grapple with the vicarious effects of sexual offences against children on justice system participants.[39]

16. **The Moral Responsibility of the Offender:** In *Friesen,* this Court made clear that sexual offences against children are highly morally blameworthy because the offender is or ought to be aware that the action can profoundly harm the child, who is highly vulnerable.[40] An offender's moral culpability is increased when a breach of trust or grooming is involved[41], or when the victim is particularly young.[42]

17. This Court acknowledged in *Friesen* that the moral responsibility of an offender may be reduced where systemic and background factors have brought an Indigenous offender before the Court, or where an offender suffers a mental disability that imposes serious cognitive limitations. However, as submitted above, it is likely that an Indigenous offender will still likely receive a

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[38] For examples of sexualized conversation with an undercover officer, see *R. v. Morrison,* 2019 SCC 15 at ¶4; *R. v. Cowell*, 2019 ONCA 972 at ¶¶10-12, leave to appeal refused [2020] S.C.C.A. No. 54. *R. v. Somogyi*, [2011] O.J. No. 253 (Sup. Crt.) is an example of a case in which the offender engaged in a sexualized conversation with undercover officers, and used his webcam to show himself masturbating to the person he thought was a child between 9 and 13 years old. Similarly, in *R. v. Collier*, 2021 ONSC 6827 at ¶¶19-21, the offender sent the undercover officer photographs of his erect penis. An example of when an offender distributed child pornography to an undercover officer in the course of the offence of child luring can be found in *R. v. Bergeron,* 2009 ONCJ 104 at ¶¶4-10.

[39] *R. v. Marratt*, 2019 ONCJ 618 at ¶¶7-22.
[40] *R. v. Friesen, supra*, at ¶¶88-90.
[41] *R. v. Friesen, supra,* at ¶129, ¶153.
[42] *R. v. Friesen, supra,* at ¶135.

lengthy period of incarceration for child luring. Moreover, as this Court held in *Friesen,* offenders will usually have at least some awareness of the harm sexual offences against children cause.[43]

18. This Court also made clear in *Friesen* that courts must give effect to the moral culpability of the offender even where the facts giving rise to the conviction involve a sting operation. Although the absence of a real child is relevant, it should not be overemphasized. The offender can take no credit for this factor as he believed he was communicating with a child for the purpose of facilitating one of the secondary offences. Moreover, sting operations are an important tool in detecting those who would lure children.[44]

**d. The Sentencing Range for Child Luring in Summary Proceedings**

19. It is difficult to find reported caselaw in Ontario reflecting the appropriate sentence for child luring in summary proceedings.[45] In *Friesen,* this Court established that mid-single digit penitentiary terms for sexual offences against children are normal.[46] However, in the case of summary proceedings, an offender cannot receive a custodial sentence beyond two years' less a day jail.[47] In the submission of the Attorney General of Ontario, the appropriate sentence for child

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[43] *R. v. Friesen, supra*, at ¶88.
[44] *R. v. Friesen, supra,* at ¶¶93-94.
[45] The limited caselaw available includes three cases which pre-date *Friesen* and which include a range of sentence from 90 days' jail and 3 years' probation (upon a finding of unconstitutionality of the mandatory minimum punishment) to 8 months' jail: *R. v. Mermer*, *supra*; *R. v. Randall,* 2018 ONCJ 470; and, *R. v. H.O.*, 2020 ONCJ 69. One case has upheld the constitutionality of the mandatory minimum punishment post-*Friesen,* and imposed the minimum: *R. v. Ditoro,* 2021 ONCJ 540.

[46] *R. v. Friesen, supra,* at ¶114.
[47] Section 172.1(2)(b) of the *Criminal Code, supra*.

luring in summary proceedings will be at or near the high end of the summary range, given this Court's recognition in *Friesen* of the devastating consequences of child sexual offences. This Court has made clear that a maximum sentence is not reserved for the worst case and worst offender.[48] Further, the sentence for a hybrid offence prosecuted summarily should not be "scaled down" from the maximum on summary conviction simply because the offender would likely have received less than the maximum had they been prosecuted by indictment.[49] Rather, the sentencing principles set out in the *Criminal Code* apply regardless of the mode of procedure, but within the limits of the available sentence established by Parliament for that mode of procedure.[50]

### *ii. The Second Stage of the Hills / Hilbach Section 12 Analysis*

20. At the second stage of the s.12 constitutional analysis, a court must consider whether the impugned provision requires the imposition of a sentence that is grossly disproportionate, not merely excessive, to the fit and proportionate sentence.[51] In determining whether a sentence is grossly disproportionate, a court is 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. In some cases, one alone could lead to a finding of gross disproportionality, while other times it will be a combination of the factors that will lead either to a finding of gross disproportionality or one of constitutional compliance.[52]

#### a. The Scope and Reach of the Offence

21. In *R. v. Morrison,* the Court held that the offence of child luring under s.172.1 casts its net over a wide range of potential conduct. The age of the child can vary as between subsections

[48] *R. v. Solowan*, 2008 SCC 62 at ¶3.
[49] *R. v. Solowan, supra,* at ¶15.
[50] *R. v. Solowan, supra,* at ¶16.
[51] *R. v. Hills, supra,* at ¶40.
[52] *R. v. Hills, supra,* at ¶124.

172.1(1)(a) to (c), the secondary offence can vary, and s.172.1's scope can encompass situations from a single text message sent by a 21-year-old to a 15-year-old to numerous conversations over weeks and months between a middle-aged adult and a 13-year-old child.[53] However, child luring is always a serious offence that targets vulnerable children[54], and this Court recognized in *Friesen* that even a single instance of sexual violence can permanently alter the course of a child's life.[55] Moreover, the Crown must always prove beyond a reasonable doubt that the offender communicated with a person who was, or who the offender believed to be, underage, with the specific intent to facilitate the commission of a sexual offence, or an abduction.[56] It is submitted that although the offence of child luring can be committed in a broad range of circumstances, those circumstances are united by the risk of life-altering harm and a high *mens rea*.

**b. The Effects of the Penalty on the Offender**

22. In *Hills,* this Court explained that the question at this stage is the effects the punishment would have on the real or hypothetical offender.[57] The mandatory minimum punishment at issue in this case requires a short period of imprisonment. The Attorney General of Ontario submits that the mandatory minimum punishment is *less* than that which the severity of the offence, and the principles of sentencing, demand. Moreover, even if a reduction in sentence is appropriate due to the effect of a sentence on a particular offender as a result of personal circumstances (for example, law enforcement officers or those suffering disability), the mandatory minimum punishment is so

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[53] *R. v. Morrison, supra,* at ¶146 *per* Moldaver J., ¶¶179-183 *per* Karakatsanis J. in dissent, but not on this issue.
[54] *R. v. Morrison, supra*, at ¶153 *per* Moldaver J., ¶¶176-177 *per* Karakatsanis J. in dissent, but not on this issue.
[55] *R. v. Friesen, supra,* at ¶58.
[56] *R. v. Morrison, supra*, at ¶153 *per* Moldaver J..
[57] *R. v. Hills, supra*, at ¶133.

low as compared to the appropriate sentence in the normal case that the effects of the mandatory minimum punishment will not be disproportionate on that offender.

**c. The Penalty, Including the Balance Struck by its Objectives**

23. Parliament has chosen to prioritize denunciation and deterrence for sexual offences against children, and this Court has held that this choice represents a reasoned response to the wrongfulness of the offences and the harm they cause.[58] Predators now have vast access to children online, and child luring is difficult to prevent given the anonymity available.[59] In this circumstance, denunciation and deterrence take on increased significance, with little other way to control the rapid proliferation of the offence. Parliament has not excluded rehabilitation from the mandatory minimum punishment[60], as evidenced by its relative brevity. Parliament and the judiciary are *ad idem* that the harms of child sexual offences were previously under-appreciated and that sentences must increase.

***iii. The Mandatory Minimum Punishment in Section 172.1(2)(b) is Constitutional***

24. Gross disproportionality is a high bar. Courts have described what it means by using such phrases as "so excessive as to outrage standards of decency", "abhorrent or intolerable", and "shocks the conscience".[61] It cannot be said that the mandatory minimum sentence for the serious offence of child luring, with its attendant harms and high *mens rea*, is grossly disproportionate. The jurisprudence supports a range of sentence for child luring that is higher than the mandatory minimum punishment in summary and indictable proceedings. Denunciation and deterrence are properly prioritized to bring under control the explosive growth of child luring.[62] The mandatory

[58] *R. v. Friesen, supra,* at ¶105.
[59] *R. v. Coban,* 2022 BCSC 1810 at ¶187.
[60] *R. v. Hills, supra,* at ¶140.
[61] *R. v. Hills, supra,* at ¶182.
[62] *R. v. Sinclair,* 2022 MBCA 65 at ¶76.

minimum punishment is short, and its value is to send a message that sexual offences against children are abhorrent and will not be tolerated.[63]

## B. Reasonable Hypotheticals Should Be Tailored to the Harm at Which the Offence is Targeted

25. In revisiting the s.12 analysis in *Hills*, this Court clarified that reasonable hypothetical scenarios must be "constructed with care".[64] They must be "reasonable" scenarios that "raise realistic issues about the scope of the mandatory minimum".[65] In other words, "[w]hile it may be tempting to allow the word "hypothetical" to overwhelm, it is the *reasonableness* of the scenario that must be underscored" [emphasis in original].[66]

26. This Court established in *Hills* that a *reasonable* hypothetical must be "tailored to the offence in question". It must include conduct that actually falls within the relevant provision. It should not include "fanciful facts" that "strain" the required elements of the offence.[67] Courts may rely on reported cases as examples of scenarios that have actually happened. However, this Court reiterated in *Hills* a point previously made in *Morrisey*: reported cases may be excluded if they represent "marginally imaginable", "remote", or "extreme" cases.[68] This Court also reiterated in *Hills* that while the personal characteristics of an offender may be considered, the construction of reasonable hypotheticals is not an exercise in creating the "most sympathetic" offender imaginable. Courts "should be wary of detailed scenarios that stack mitigating factors combined with an interpretation that stretches and strains the technical meaning of the offence".[69]

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[63] *R. v. Cowell, supra,* at ¶128.
[64] *R. v. Hills*, *supra,* at ¶76.
[65] *R. v. Hills*, *supra,* at ¶67, ¶¶78-80.
[66] *R. v. Hills*, *supra,* at ¶76.
[67] *R. v. Hills, supra*, at ¶83, ¶91.
[68] *R. v. Hills*, *supra,* at ¶81; *R. v. Morrisey*, 2000 SCC 39 at ¶30, ¶32.
[69] *R. v. Hills*, *supra,* at ¶¶86-92.

27. In light of these principles, Ontario makes the following submissions about the construction of reasonable hypotheticals in *Marchand* and *H.V.*:

i. Scenarios that do not clearly include every element of the offence should be excluded. In particular, it must be clear from the facts of the scenario that the offender had the requisite intent to facilitate an enumerated sexual offence or child abduction, and that no defence would be readily available;

ii. Scenarios that stretch and strain the required elements by focusing on marginal conduct that *does not capture the harm the offence is designed to address*, and that would not foreseeably be charged or prosecuted, should be excluded;

iii. Scenarios should include a consideration of the actual and potential harm caused by the offence and the impact it would have on the hypothetical victim and/or community[70]; and,

iv. Scenarios should include a consideration of the reasonably foreseeable characteristics of victims, including the "disproportionate impact" sexual violence has on Indigenous children and children belonging to other marginalized groups. This Court recognized in *Friesen* that "[c]hildren who belong to groups that are marginalized are at a heightened risk of sexual violence that can perpetuate the disadvantage they already face", including Indigenous children, children and youth in government care, children with disabilities, and LGBT2Q+ youth.[71] As this Court made clear in *Hills,* the assessment of a mandatory minimum's constitutionality should be rooted in the realities of people's lives.[72]

[70] *R. v. Friesen*, *supra,* at ¶¶74-94.
[71] *R. v. Friesen*, *supra,* at ¶¶70-73.
[72] *R. v. Hills, supra,* at ¶86.

### C. The Essential Elements of Child Luring Involve a High Degree of Moral Blameworthiness Regardless of How the Offence Is Committed

28. The essential elements of child luring differ depending on whether the recipient of the communication is a fictional child in an undercover police sting or a real child. In both cases, the Crown must prove that the accused's communications were intentional, and that the accused had the specific intent to facilitate the commission of an enumerated sexual offence or child abduction.[73] The only difference between the two modes of committing the offence relates to the accused's knowledge of the age of the recipient of the communication.

29. If the recipient of the communication is a fictional child, the wording of s. 172.1(1) requires the Crown to prove that the accused "believe[d]" the recipient to be underage. This Court held in *Morrison* that, in the context of a police sting, the Crown must prove beyond a reasonable doubt that the accused "either (1) believed the other person was underage or (2) was wilfully blind as to whether the other person was underage". In this specific context, recklessness, or a failure to take reasonable steps, are insufficient to ground a conviction: "proving that the accused had a mere awareness of a risk that the other person was underage does not establish that the accused *believed* the person was underage, which is what s. 172.1(1) requires in the context of a police sting where there is no underage person" [emphasis in original].[74]

30. However, the wording of s. 172.1(1) differs when it comes to real children. If the recipient of the communication is a real child, s. 172.1(1) simply requires the Crown to prove that the recipient "is" underage. Consequently, before *Morrison*, Ontario courts did not view subjective belief in age as an essential element of the offence of child luring (or other offences with similar wording, including sexual interference and invitation to sexual touching). Rather, "the *mens*

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[73] *R. v. Morrison*, *supra,* at ¶95; *R. v. Legare*, *supra,* at ¶¶36-37.
[74] *R. v. Morrison*, *supra,* at ¶¶96-97, ¶¶101-102, ¶116, ¶121, ¶126, ¶¶129-133.

*rea,* as it related to the age of the complainant, required the Crown to prove beyond a reasonable doubt the absence of a belief founded on reasonable inquiries that the complainant was the required age or older". If the accused did not take the reasonable steps mandated by the *Criminal Code*, their subjective belief as to the complainant's age was "irrelevant".[75]

31. There has been some uncertainty in Ontario jurisprudence since *Morrison* as to precisely what the Crown is required to prove in relation to the accused's knowledge of the complainant's age for offences that have a defence of mistaken belief in age. The Ontario Court of Appeal has not directly addressed this issue in the context of child luring involving real children. However, in *Carbone*, the Court of Appeal addressed the defence of mistaken belief in age in the context of invitation to sexual touching. The Court of Appeal concluded that, based on the "language, structure, and scope of s. 172.1", this Court's decision in *Morrison* is confined to police stings in child luring cases. The Court of Appeal found that a "stringent subjective standard" of *mens rea* is warranted in police sting cases on the basis of the principles of "fault and restraint", as "the justification for the criminalization of the actions lies almost entirely in the accused's mistaken belief he is speaking with someone under 16".[76]

32. Nonetheless, the Court of Appeal concluded in *Carbone* that some of this Court's language in *Morrison* mandated a change to how the *mens rea* of invitation to sexual touching is understood. There is a *mens rea* requirement focusing on the accused's knowledge of the complainant's age. That requirement cannot be made out solely on the basis of the Crown's negation of the defence of mistaken belief in age. However, unlike in cases involving fictional children, recklessness is sufficient to make out the *mens rea*, just as recklessness is sufficient to make out the *mens rea* in

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[75] *R. v. Carbone*, 2020 ONCA 394 at ¶67, ¶¶74-78; *R. v. Saliba*, 2013 ONCA 661 at ¶¶26-28; *R. v. Dragos*, *supra,* at ¶¶11-14, ¶¶29-33; *R. v. Duran*, 2013 ONCA 343 at ¶51.
[76] *R. v. Carbone*, *supra,* at ¶95-115.

relation to the absence of consent in sexual assault cases. Recklessness consists of choosing to proceed despite knowing that there is a risk the complainant is underage. Recklessness also includes reckless indifference, or choosing to treat the complainant's age as irrelevant and assume the associated risk. The Court of Appeal noted that this change in how the *mens rea* is defined should have "little practical effect on verdicts", as a failure to take reasonable steps will amount to at least recklessness in virtually all cases.[77] In *W.G.*, the Ontario Court of Appeal reached the same conclusion in relation to the *mens rea* for the offence of sexual interference.[78]

33. This conclusion mirrors the British Columbia Court of Appeal's post-*Morrison* conclusion that convictions for sexual interference can be sustained on the basis of a failure to take reasonable steps to ascertain the complainant's age. Unlike the Ontario Court of Appeal, the British Columbia Court of Appeal found that this Court's decision in *Morrison* did not mandate any change in how the *mens rea* for sexual interference is defined, and that, outside of the context of police stings in child luring cases, "[m]ore precise reasoning by the Supreme Court of Canada than exists in *Morrison* is required before it can be extended to the interrelationship of the *mens rea* requirement and mistake of age defence". However, both appellate courts that have considered this issue reached the same result by taking similar approaches. Both courts concluded that (i) recklessness suffices to make out the *mens rea* in relation to knowledge of age for sexual interference, and (ii) a failure to take reasonable steps to ascertain the complainant's age amounts to at least recklessness in virtually all cases.[79]

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[77] *R. v. Carbone*, *supra,* at ¶¶116-131.
[78] *R. v. W.G.*, *supra,* at ¶¶59-81.
[79] *R. v. Angel*, 2019 BCCA 449 at ¶¶22-52, leave to appeal dismissed, [2020] S.C.C.A. No. 35*; R. v. Jerace*, 2021 BCCA 94 at ¶¶29-41, leave to appeal dismissed, [2021] S.C.C.A. No. 132.

34. For the purposes of resolving the appeals in *Marchand* and *H.V.*, it is not necessary for this Court to address the precise *mens rea* for child luring or other offences in cases involving real children. As the offence of child luring is currently understood and applied, both modes involve a high degree of moral blameworthiness. In the case of a real child, real harm is done when an offender knowingly or recklessly engages in communications for the purpose of facilitating an enumerated sexual offence or abduction. In the case of a fictional child, the even higher *mens rea* requirement ensures that only offenders who knowingly communicate with someone they believe to be a child for the purpose of facilitating an enumerated offence are convicted. As this Court put it in *Friesen*, an offender "can take no credit" for the fact that they were communicating with an undercover officer rather than a real child.[80]

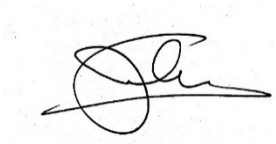
## PART IV – SUBMISSIONS ON COSTS

35. The Attorney General of Ontario makes no submissions as to costs.

## PART V – ORDER REQUESTED

36. The Attorney General of Ontario asks that the issues be resolved in accordance with the foregoing submissions.

37. The Attorney General of Ontario requests permission to present oral argument at the hearing of this appeal.



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[80] *R. v. Friesen*, *supra,* at ¶¶93-94.

## SCHEDULE A: TABLE OF AUTHORITIES

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