



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Morrison, 2019 SCC 15

**APPEAL HEARD:** May 24, 2018

**JUDGMENT RENDERED:** March 15, 2019

**DOCKET:** 37687

**BETWEEN:**

**Her Majesty The Queen**  
Appellant/Respondent on cross-appeal

and

**Douglas Morrison**  
Respondent/Appellant on cross-appeal

- and -

**Attorney General of Canada, Attorney General of Quebec,  
Attorney General of British Columbia, Attorney General of  
Saskatchewan, Attorney General of Alberta and Criminal  
Lawyers' Association (Ontario)**  
Interveners

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,  
Rowe and Martin JJ.

**REASONS FOR JUDGMENT:** Moldaver J. (Wagner C.J. and Gascon, Côté, Brown, Rowe  
(paras. 1 to 160) and Martin JJ. concurring)

**CONCURRING REASONS:** Karakatsanis J.  
(paras. 161 to 194)

**REASONS DISSENTING IN PART:** Abella J.  
(paras. 195 to 227)

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R. v. MORRISON

**Her Majesty The Queen**

*Appellant/Respondent on cross-appeal*

v.

**Douglas Morrison**

*Respondent/Appellant on cross-appeal*

and

**Attorney General of Canada,  
Attorney General of Quebec,  
Attorney General of British Columbia,  
Attorney General of Saskatchewan,  
Attorney General of Alberta and  
Criminal Lawyers' Association (Ontario)**

*Intervenors*

**Indexed as: R. v. Morrison**

**2019 SCC 15**

File No.: 37687.

2018: May 24; 2019: March 15.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law — Charter of Rights — Presumption of innocence — Child luring — Police sting operation — Presumption of belief regarding age — Accused charged with child luring after communicating online with police officer posing as 14-year-old girl — Accused contesting constitutionality of Criminal Code provision establishing presumption that if person with whom he was communicating was represented to him as being underage, he believed representation absent evidence to the contrary — Whether presumption infringes accused’s right to be presumed innocent — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Criminal Code, R.S.C. 1985, c. C-46, s. 172.1(3).*

*Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Child luring — Police sting operation — Accused charged with child luring after communicating online with police officer posing as 14-year-old girl — Accused contesting constitutionality of Criminal Code provision barring him from raising as defence that he believed person with whom he was communicating was of legal age unless he took reasonable steps to ascertain person’s age — Whether reasonable steps requirement deprives accused of liberty in violation of principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C-46, s. 172.1(4).*

M posted an advertisement online in the “Casual Encounters” section on Craigslist, with the title “Daddy looking for his little girl — m4w — 45 (Brampton)”. A police officer, posing as a 14-year-old girl named Mia, responded to the ad. In

conversations taking place over the span of more than two months, M invited “Mia” to touch herself sexually and proposed that they meet to engage in sexual activity. These communications led to M being charged with child luring under s. 172.1(1)(b) of the *Criminal Code*, which prohibits communicating, by means of telecommunication, with a person who is, or who the accused believes is, under the age of 16 for the purposes of facilitating the commission of certain designated offences against that person — here, the offence of invitation to sexual touching directed at a person under the age of 16 contrary to s. 152 of the *Criminal Code*.

At trial, M challenged the constitutionality of three subsections of the child luring provisions: s. 172.1(2)(a), (3), and (4) of the *Criminal Code*. First, he argued that s. 172.1(3) (which provides that if the person with whom the accused was communicating (“other person”) was represented to the accused as being underage, then the accused is presumed to have believed that representation absent evidence to the contrary) violated his right to be presumed innocent under s. 11(d) of the *Charter*. Second, he argued that s. 172.1(4) (which bars an accused from raising, as a defence, that he or she believed the other person was of legal age, unless the accused took reasonable steps to ascertain the other person’s age) violated his rights under ss. 7 and 11(d) of the *Charter*. Third, he argued that s. 172.1(2)(a) (which prescribes a mandatory minimum sentence of one year’s imprisonment if the Crown proceeds by way of indictment) violated his right not to be subjected to cruel and unusual punishment under s. 12 of the *Charter*. The trial judge accepted M’s submission with respect to s. 172.1(3) and held it to be of no force and effect. However, he held that s. 172.1(4) complied with the *Charter* and was constitutionally valid, and he

convicted M on the basis that he had not taken reasonable steps to ascertain “Mia’s” age. At sentencing, he concluded that the mandatory minimum under s. 172.1(2)(a) was grossly disproportionate when applied to M and therefore violated s. 12 of the *Charter*. He sentenced M to four months’ imprisonment and probation for a year. The Ontario Court of Appeal unanimously upheld M’s conviction and sentence and each of the trial judge’s conclusions on the three constitutional questions. The Crown appeals the Court of Appeal’s decision with respect to s. 172.1(2)(a) and (3). M cross-appeals, now submitting that s. 172.1(4) is unconstitutional because it allows for a conviction on the basis of objective fault, notwithstanding the high stigma and severe punishment attached to a conviction for child luring, thereby violating the principles of fundamental justice under s. 7 of the *Charter*.

*Held* (Abella J. dissenting in part): The appeal and cross-appeal should be allowed in part. Section 172.1(3) of the *Criminal Code* should be declared to be of no force or effect. The accused’s conviction should be set aside and a new trial should be ordered.

*Per* Wagner C.J. and **Moldaver**, Gascon, Côté, Brown, Rowe and Martin JJ.: Section 172.1(3) of the *Criminal Code* infringes s. 11(d) of the *Charter*, and that infringement cannot be saved under s. 1. It is therefore of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Section 172.1(4) of the *Criminal Code* does not infringe s. 7 of the *Charter*. However, the lower courts erred in their reading of the reasonable steps requirement under s. 172.1(4), and therefore M’s conviction should be set aside and a new trial should be ordered. In view of the lower courts’

errors with respect to the reasonable steps requirement, any final determination as to the constitutionality of s. 172.1(2)(a) should be remitted to the presiding judge at M's new trial, should he be convicted again.

The presumption under s. 172.1(3) of the *Criminal Code* offends s. 11(d) of the *Charter*. In the context of a sting operation where there is no underage person, s. 172.1(1)(b) of the *Criminal Code* stipulates that in order to secure a conviction, the Crown must prove beyond a reasonable doubt that, among other things, the accused believed the other person was under the age of 16. Subsection 172.1(3), however, creates a presumption that proof that the other person was represented to the accused as being under 16 will, absent evidence to the contrary, stand in for proof of the essential element that the accused believed the other person was under 16. A presumption will comply with s. 11(d) of the *Charter* solely if proof of the substituted fact leads inexorably to the existence of the essential element it replaces. The nexus requirement for demonstrating that a statutory presumption does not offend the presumption of innocence is strict: the connection between proof of the substituted fact and the existence of the essential element it replaces must be nothing less than inexorable. An inexorable link is one that necessarily holds true in all cases. Here, the mere fact that a representation of age was made to the accused does not lead inexorably to the conclusion that the accused believed that representation, even absent evidence to the contrary. Where a representation of age is made online, the trier of fact could still be left with a reasonable doubt at the close of the Crown's case as to whether the accused believed the other person was underage — despite this, the accused's belief that the other person was underage would be deemed to be

established beyond a reasonable doubt by virtue of s. 172.1(3). This contravenes the presumption of innocence.

The infringement of s. 11(d) of the *Charter* by s. 172.1(3) of the *Criminal Code* cannot be justified under s. 1 of the *Charter*. The parties agree that s. 172.1(3) has a pressing and substantial objective and the *Charter* limit it creates is rationally connected to that objective. However, it fails the minimal impairment test. The Crown has failed to establish that, absent the presumption, the child luring provision cannot operate effectively. Where the other person is represented to the accused as being underage, the trier of fact can, on the basis of evidence, draw a logical, common sense inference that the accused believed that representation. In addition, the deleterious effects of the presumption outweigh its salutary effects. Although the presumption may ease the Crown's burden of proving its case, prosecutorial convenience and expediency cannot justify the risk of convicting the innocent that it creates.

The reasonable steps requirement under s. 172.1(4) of the *Criminal Code* does not violate s. 7 of the *Charter*. This requirement does not, in the absence of the presumption under s. 172.1(3), allow for a conviction where the Crown has only proven that the accused failed to take reasonable steps to ascertain the other person's age, contrary to the approach taken by the trial judge and endorsed by the Court of Appeal. Rather, there is only one pathway to conviction available: the Crown must prove beyond a reasonable doubt that the accused believed the other person was underage. By expressly including a presumption under s. 172.1(3) as to the accused's

belief in this regard — albeit a presumption which has been found to be unconstitutional — Parliament signalled that the requirement of proving belief is essential in the context of a police sting operation where there is no underage person. Subsection 172.1(4) does not make this requirement any less essential. In the absence of the presumption under s. 172.1(3), it bars accused persons from raising, as a defence, that they believed the other person was of legal age where they failed to take reasonable steps to ascertain the other person's age. Consequently, if the Crown proves beyond a reasonable doubt that the accused did not take reasonable steps, then the trier of fact is precluded from considering the defence that the accused believed the other person to be of legal age. But that does not relieve the Crown of its ultimate burden of proving beyond a reasonable doubt that the accused believed the other person was underage. Thus, if the trier of fact can only conclude from the evidence that the accused was negligent or reckless with regard to the other person's age, the Crown has not met its burden, and the accused is entitled to an acquittal, since negligence and recklessness are states of mind that do not entail any concrete belief about the other person's age. An accused cannot be convicted merely for failing to establish a defence; rather, a conviction will be sustained only where the Crown is able to negate a properly raised defence and show, on the evidence as a whole, that all of the essential elements of the offence in question have been proved beyond a reasonable doubt. In the case of child luring, s. 172.1(4) does not create a situation in which an accused may be convicted on the basis of simple negligence — namely, in this context, a failure to take reasonable steps. Rather, only subjective *mens rea* — in this case, belief — will suffice. In the instant case, the trial judge entered a guilty verdict on a basis that was legally unsound — he found M guilty on the basis that he

had failed to take reasonable steps to ascertain “Mia’s” age. For the trial judge to have properly convicted M, he would have had to be satisfied beyond a reasonable doubt that M believed “Mia” was under the age of 16.

In the absence of s. 172.1(3), which has been found to be of no force and effect, the Crown can no longer secure a conviction in the context of a police sting where there is no underage person by proving that the accused failed to take reasonable steps to ascertain the other person’s age once a representation as to age was made. Instead, the Crown must prove beyond a reasonable doubt that the accused believed the other person was underage. To meet its burden, the Crown must show that the accused either (1) believed the other person was underage or (2) was wilfully blind as to whether the other person was underage. The second alternative is legally equivalent to the first. Conversely, a showing that the accused was merely reckless, rather than wilfully blind, as to whether the other person was underage will not ground a conviction. The “reasonable steps” that the accused is required to take under s. 172.1(4) are steps that a reasonable person, in the circumstances known to the accused at the time, would take to ascertain the other person’s age. The reasonable steps requirement therefore has both objective and subjective dimensions: the steps must be objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time. Reasonable steps are meaningful steps that provide information reasonably capable of supporting the accused’s belief that the other person was of legal age. Relatedly, if the accused takes some initial steps that could reasonably support a belief that the other person is of legal age, but red flags are subsequently raised suggesting he or she may not be,

then the accused may be required to take additional steps to ascertain the other person's age. The requirement is an ongoing one. Reasonable steps need not be active. There is no compelling reason, whether in a sting context or otherwise, for foreclosing the notion that arguably passive conduct — such as the receipt and consideration of unsolicited information — could provide information reasonably capable of supporting the accused's belief that the other person was of legal age. Further, the accused is not required to exhaust all potential reasonable steps in order to invoke the defence. The reasonable steps requirement should be applied with a healthy dose of common sense. The approach to assessing reasonable steps is a highly contextual one that accounts for the setting in which the communications take place: the Internet.

Accordingly, the defence that the accused believed the other person was of legal age operates in practice as follows: (1) in order to raise the defence, the accused bears the evidentiary burden of pointing to some evidence from which it may be found that he or she took reasonable steps and honestly believed the other person was of legal age — the accused must show that the defence has an air of reality; (2) if the accused discharges his or her evidentiary burden, the defence is left with the trier of fact, and the Crown then bears the persuasive burden of disproving the defence beyond a reasonable doubt; and (3) regardless of whether the defence can be considered, the trier of fact must ultimately determine whether the Crown has proven beyond a reasonable doubt that the accused believed the other person was underage. Thus, whether the accused is convicted or acquitted does not hinge on whether the accused took reasonable steps; it hinges on whether the Crown can prove culpable

belief beyond a reasonable doubt. Where an accused has failed to take reasonable steps, the trial judge must instruct the jury that the accused's evidence that he or she believed the other person was of legal age cannot be considered in determining whether the Crown has proven its case beyond a reasonable doubt. Where reasonable steps have not been taken, an accused's evidence that he or she believed the other person was of legal age is without any value, and the jury cannot rely on that evidence when assessing the strength of the Crown's case. In that event, the sole question the jury must consider is whether — on the whole of the evidence, including the evidence relating to the accused's failure to take reasonable steps — the Crown has established, beyond a reasonable doubt, that the accused believed the other person was underage.

It would be unwise to rule on the constitutional validity of the mandatory minimum under s. 172.1(2)(a) of the *Criminal Code* in this appeal since the courts below proceeded on the mistaken understanding that M could be convicted on the basis of his failure to take reasonable steps, and their conclusions on the s. 12 issue rested, at least in part, on this mistaken understanding. Furthermore, the parties did not have the opportunity to make submissions on this matter with the benefit of a clear statement from the Court as to the *mens rea* required for a conviction.

*Per Karakatsanis J.:* There is agreement with the majority regarding the proper interpretation and constitutionality of ss. 172.1(3) and (4) of the *Criminal Code* and that the conviction should be set aside and a new trial ordered. However, it is incumbent on the Court to address the issue of the constitutionality of the

mandatory minimum punishment set out in s. 172.1(2)(a) of the *Criminal Code* in this case. Otherwise M, as well as other individuals convicted of a child luring offence by way of indictment, may find themselves subject to a mandatory minimum sentence that is constitutionally unsound.

The mandatory minimum sentence in s. 172.1(2)(a) violates s. 12 of the *Charter* and is not saved by s. 1. Section 172.1(2)(a) should therefore be declared to be of no force and effect under s. 52 of the *Constitution Act, 1982*. To determine whether a mandatory minimum sentence imposes a grossly disproportionate punishment and thereby qualifies as cruel and unusual punishment, the mandatory minimum sentence for the relevant offence is compared to the fit and proportionate sentence that would otherwise be mandated by the sentencing principles found in the *Criminal Code*. If, in a reasonably foreseeable case, imposing the mandatory minimum would result in a grossly disproportionate sentence, then the mandatory minimum violates s. 12. When assessing a mandatory minimum in the context of reasonably foreseeable cases, it will often be helpful to consider previously reported cases. In addition, judges should be guided by their judicial experience and need not limit their inquiry to only the facts of reported cases. The thrust of the s. 12 inquiry focuses on reasonably foreseeable applications of the law. Courts are required to consider the scope of the offence, the types of activities it penalizes and the reasonably foreseeable circumstances in which it may arise.

Given the gravity of the offence of child luring, there is no doubt that, in many cases, the appropriate sentence will be a term of imprisonment that falls within

the range contemplated by s. 172.1(2)(a). However, the offence casts a wide net since it can be committed in various ways, under a broad array of circumstances and by individuals with a wide range of moral culpability. This increases the likelihood of the provision catching individuals whose conduct will not warrant punishment remotely close to that required by the mandatory minimum sentence. Indeed, the s. 172.1(1) jurisprudence demonstrates that the fit and proportionate sentence can be significantly less than the one-year mandatory minimum term of imprisonment required by the *Criminal Code*.

Furthermore, s. 172.1(1) is a hybrid offence with a disparity between the mandatory minimum sentences for individuals guilty of child luring on summary conviction and those guilty on indictment. This strongly suggests that the one-year mandatory minimum for an individual guilty of child luring on indictment violates s. 12 of the *Charter*. The 90-day mandatory minimum for summary conviction offences clearly demonstrates that Parliament understood that, in certain circumstances, a sentence far below that required by the one-year mandatory minimum would be appropriate. Sentencing someone to one year in jail when the fit and proportionate sentence would be 90 days or less is intolerable and would be shocking to Canadians. It is a cruel and unusual punishment that violates s. 12 of the *Charter* and does not represent a justifiable infringement under s. 1 of the *Charter*.

*Per Abella J.* (dissenting in part): M's conviction should be set aside and an acquittal ordered.

The reasonable steps requirement in s. 172.1(4) constitutes an infringement of the right to make full answer and defence and the presumption of innocence under ss. 7 and 11(d) of the *Charter*, eroding these rights in a way that risks convicting the innocent. It is therefore unconstitutional. Striking down the presumption under s. 172.1(3) does not eliminate a second, objective path to conviction since under s. 172.1(4), a conviction is available if the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain the communicant's age.

To constitute child luring, the accused must believe the communicant to be a child. Given the anonymous and unverifiable nature of online identities, the requirement to take "reasonable steps" to ascertain age in s. 172.1(4) may impose a nearly insurmountable barrier to the accused's ability to raise and defend his or her own innocent belief. Moreover, additional communications made in an effort to ascertain age can put the accused at a heightened risk of being inculpated in the offence of child luring because of the inherent similarity between evidence going to reasonable steps and evidence of child luring in the Internet context. The result of the reasonable steps requirement in s. 172.1(4) is therefore to render illusory the accused's ability to allege an honest but mistaken belief in age. This constitutes an interference with the accused's fundamental right to make full answer and defence under s. 7 and the presumption of innocence under s. 11(d). Section 172.1(4) cannot be saved under s. 1 of the *Charter*, since the harmful effects of the reasonable steps requirement outweigh any salutary impact.

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By Moldaver J.

**Applied:** *R. v. Oakes*, [1986] 1 S.C.R. 103; **considered:** *R. v. LeVigne*, 2010 SCC 25, [2010] 2 S.C.R. 3; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; **referred to:** *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551; *R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Audet*, [1996] 2 S.C.R. 171; *R. v. Pengelley*, 2010 ONSC 5488, 261 C.C.C. (3d) 93; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. Logan*, [1990] 2 S.C.R. 731; *R. v. Creighton*, [1993] 3 S.C.R. 3; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873; *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440; *R. v. Dragos*, 2012 ONCA 538, 111 O.R. (3d) 481; *R. v. Thain*, 2009 ONCA 223, 243 C.C.C. (3d) 230; *R. v. Ghotra*, 2016 ONSC 1324, 334 C.C.C. (3d) 222; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Nur*,

2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Smith*, [1987] 1 S.C.R. 1045; *Miller v. The Queen*, [1977] 2 S.C.R. 680; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90; *R. v. EJB*, 2018 ABCA 239, 72 Alta. L.R. (6th) 29; *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269.

By Karakatsanis J.

**Referred to:** *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3; *R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173; *R. v. Jarvis (2006)*, 211 C.C.C. (3d) 20; *R. v. Folino*, 2005 ONCA 258, 77 O.R. (3d) 641; *R. v. Woodward*, 2011 ONCA 610, 107 O.R. (3d) 81; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551; *R. v. Rafiq*, 2015 ONCA 768, 342 O.A.C. 193; *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; *R. v. Read*, 2008 ONCJ 732; *R. v. Dehesh*, [2010] O.J. No. 2817; *R. v. El-Jamel*, 2010 ONCA 575, 261 C.C.C. (3d) 293; *R. v. Folino*, 2005 ONCA 258, 77 O.R. (3d) 641; *R. v. B. and S.*, 2014 BCPC 94; *R. v. Danielson*, 2013 ABPC 26; *R. v. Pelletier*, 2013 QCCQ 10486.

By Abella J. (dissenting in part)

*R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551; *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173; *R. v. Gibson*, 2008 SCC 16, [2008] 1 S.C.R. 397; *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; *R. v. Saliba*, 2013 ONCA 661, 304 C.C.C. (3d) 133; *R. v. Duran*, 2013 ONCA 343, 306 O.A.C. 301; *R. v. P. (L.T.)* (1997), 113 C.C.C. (3d) 42; *R. v. Sinclair*, 2013 ABQB 745, 92 Alta. L.R. (5th) 64; *R. v. Malcolm*, 2000 MBCA 77, 148 Man. R. (2d) 143; *R. v. Darrach* (1998), 38 O.R. (3d) 1; *R. v. Cornejo* (2003), 68 O.R. (3d) 117; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193; *R. v. Thain*, 2009 ONCA 223, 243 C.C.C. (3d) 230; *R. v. Dragos*, 2012 ONCA 538, 111 O.R. (3d) 481; *R. v. Pengelley*, 2010 ONSC 5488, 261 C.C.C. (3d) 93; *R. v. Osborne* (1992), 102 Nfld. & P.E.I.R. 194; *R. v. Mastel*, 2011 SKCA 16, 268 C.C.C. (3d) 224; *R. v. Adams*, 2016 ABQB 648, 45 Alta. L.R. (6th) 171; *R. v. Bayat*, 2011 ONCA 778, 108 O.R. (3d) 420; *R. v. Froese*, 2015 ONSC 1075.

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*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 11(d), 12.

*Constitution Act, 1982*, s. 52(1).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 150.1(4), (5), 152, 172.1, (1) [am. 2012, c. 1, s. 22], (2) [am. 2012, c. 1, s. 22], 273.2(b), 686(1)(b)(iii), 718, 718.1.

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APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Ontario (Watt, van Rensburg and Pardu JJ.), 2017 ONCA 582, 350 C.C.C. (3d) 161, 385 C.R.R. (2d) 45, 136 O.R. (3d) 545, [2017] O.J. No. 3600 (QL), 2017 CarswellOnt 10363 (WL Can.), affirming the conviction entered and the sentence imposed by Gage J., 2015 ONCJ 598, 341 C.R.R. (2d) 25, [2015] O.J. No. 4650 (QL), 2015 CarswellOnt 13610 (WL Can.) and 2015 ONCJ 599, [2015] O.J. No. 5620 (QL), 2015 CarswellOnt 16408 (WL Can.). Appeal and cross-appeal allowed in part, Abella J. dissenting in part.

*Andreea Baiasu*, for the appellant/respondent on cross-appeal.

*Mark C. Halfyard, Salvatore Caramanna and Breana Vandebek*, for the respondent/appellant on cross-appeal.

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*W. Dean Sinclair, Q.C.*, for the intervener the Attorney General of Saskatchewan.

*Deborah Alford*, for the intervener the Attorney General of Alberta.

*Apple Newton-Smith, Daniel Brown* and *Colleen McKeown*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ. was delivered by

MOLDAVER J. —

## I. Overview

[1] In today's information age, Canadian life is increasingly playing out in the digital realm. The Internet, social media, and sophisticated mobile devices — now fixtures in our everyday lives — have transformed the way in which we live, work,

and interact with one another. This opens up a world of new opportunities and allows us to connect instantly with friends and family across the world, whenever and wherever we want, and at relatively little cost.

[2] But the Internet revolution — and the Internet itself — has a darker side. Increasingly, sexual predators are using electronic means to prey upon one of the most vulnerable groups within Canadian society: our children. Access to the Internet among Canadian children is now almost universal, and many are continuously connected, whether through a computer, a smartphone, or another device. This has led to the new and distressing phenomenon of predators lurking in cyberspace, cloaked in anonymity, using online communications as a tool for meeting and grooming children with a view to sexually exploiting them.

[3] In response, Parliament has enacted provisions in the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Code*”), aimed at prohibiting child luring through telecommunications and ensuring that those who breach this prohibition receive a punishment that reflects the gravity and seriousness of the offence and the high degree of moral blameworthiness associated with it. These provisions were the subject of this Court’s decisions in *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551 and *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3, although in neither case was their constitutionality in issue. Here, however, the question on appeal is whether these provisions infringe the accused’s rights under the *Canadian Charter of Rights and Freedoms* (“*Charter*”).

[4] The respondent, Douglas Morrison, posted an advertisement in the “Casual Encounters” section of Craigslist, with the title “Daddy looking for his little girl – m4w – 45 (Brampton)”. A police officer, posing as a 14-year-old girl named “Mia”, responded to the ad. In conversations taking place over the span of more than two months, Mr. Morrison invited “Mia” to touch herself sexually and proposed that they meet to engage in sexual activity. These communications led to Mr. Morrison being charged with child luring under s. 172.1(1)(b) of the *Code*. That provision prohibits communicating, by means of telecommunication, with a person who is, or who the accused believes is, under the age of 16 for the purpose of facilitating the commission of certain designated offences against that person — here, the offence of invitation to sexual touching directed at a person under the age of 16 contrary to s. 152 of the *Code*.

[5] At trial, Mr. Morrison challenged the constitutionality of three subsections of the child luring provisions: s. 172.1(2)(a), (3), and (4). His position on each is set out below in capsule form.

[6] First, s. 172.1(3) provides that if the person with whom the accused was communicating (hereinafter referred to as “the other person”) was represented to the accused as being underage, then the accused is presumed to have believed that representation, absent evidence to the contrary. Mr. Morrison argued that this subsection violated his right to be presumed innocent under s. 11(d) of the *Charter*.

[7] Second, s. 172.1(4) bars an accused from raising, as a defence, that he or she believed the other person was of legal age, unless the accused took reasonable steps to ascertain the other person's age. At trial, Mr. Morrison asserted that s. 172.1(4) violated ss. 7 and 11(d) of the *Charter*. Before the Court of Appeal and this Court, he argued that s. 172.1(4) was unconstitutional because it allows for a conviction on the basis of objective fault, notwithstanding the high stigma and severe punishment attached to a conviction for child luring, thereby violating the principles of fundamental justice under s. 7 of the *Charter*.

[8] Third, s. 172.1(2)(a) prescribes a mandatory minimum sentence of one year's imprisonment if the Crown proceeds by way of indictment — the election made by the Crown in Mr. Morrison's case. Mr. Morrison argued that this mandatory minimum violated his right not to be subjected to cruel and unusual punishment under s. 12 of the *Charter*.

[9] The trial judge agreed with Mr. Morrison that the presumption under s. 172.1(3) violated his right to be presumed innocent under s. 11(d) of the *Charter*. He disagreed, however, that the reasonable steps requirement under s. 172.1(4) was constitutionally invalid. Despite being left with a reasonable doubt as to whether Mr. Morrison believed "Mia" was under the age of 16, the trial judge held that subs. (4) provided an independent pathway to conviction and convicted Mr. Morrison on the basis that he had not taken reasonable steps to ascertain "Mia's" age. At sentencing, the trial judge concluded that the mandatory minimum under s. 172.1(2)(a) was grossly disproportionate when applied to Mr. Morrison and therefore violated s. 12 of

the *Charter*. In the result, he sentenced Mr. Morrison to four months' imprisonment and probation for a year. On appeal, the Ontario Court of Appeal upheld Mr. Morrison's conviction and sentence and each of the trial judge's conclusions on the three constitutional questions outlined above.

[10] Before this Court, the Crown appeals from the decision of the Court of Appeal, submitting that the court erred in holding that the presumption under s. 172.1(3) violates s. 11(d) of the *Charter* and that the mandatory minimum under s. 172.1(2)(a) infringes s. 12 of the *Charter*. Mr. Morrison cross-appeals, asserting that the Court of Appeal erred in finding that the reasonable steps requirement under s. 172.1(4) does not infringe s. 7 of the *Charter*.

[11] For the reasons that follow, I would dismiss the Crown's appeal on the s. 172.1(3) issue and Mr. Morrison's cross-appeal on the s. 172.1(4) issue. In my view, the presumption under subs. (3) infringes s. 11(d) of the *Charter* and cannot be saved under s. 1. Further, I agree with the courts below that subs. (4) does not violate s. 7 of the *Charter*.

[12] However, unlike the courts below, I do not read the reasonable steps requirement under subs. (4), in the absence of the presumption under subs. (3), as providing an independent pathway to conviction. Instead, it simply bars accused persons from raising, as a defence, that they believed the other person was of legal age when they did not take reasonable steps to ascertain the other person's age.

[13] Consequently, in order to convict Mr. Morrison, the Crown would have had to satisfy the trial judge beyond a reasonable doubt that Mr. Morrison *believed* “Mia” was under the age of 16. But because the trial judge was left with a reasonable doubt in this regard, Mr. Morrison’s conviction cannot stand.

[14] As for the question of remedy, given that the trial judge entertained a reasonable doubt on the issue of Mr. Morrison’s belief, Mr. Morrison would ordinarily be entitled to an acquittal. But in this case, for reasons I will develop, I am of the view that fairness considerations militate in favour of a new trial — one conducted in accordance with the correct legal framework.

[15] Finally, the courts below proceeded on an incorrect understanding that s. 172.1 allows for a conviction based on a failure to take reasonable steps. The parties’ arguments before this Court concerning the constitutionality of the mandatory minimum reflect the erroneous assumption flowing from this: namely, that mere negligence is sufficient to support a conviction (something that the trial judge gave effect to in sentencing Mr. Morrison). In light of this, I am of the view that it would be unwise to decide whether the one-year mandatory minimum under s. 172.1(2)(a) runs afoul of s. 12 of the *Charter* on this appeal. Accordingly, I would set aside that aspect of the Court of Appeal’s decision and remit the matter to the presiding judge at the new trial, should Mr. Morrison be convicted again.

## II. Statutory Provisions

[16] Section 172.1 of the *Code* contains four components, each housed in its own subsection. Those components, and the corresponding subsections, are: (1) a prohibition against child luring; (2) the punishments available on conviction; (3) a presumption regarding the accused's belief in the other person's age; and (4) a limitation on the defence that the accused believed the other person was of legal age.

### **Luring a child**

**172.1 (1)** Every person commits an offence who, by a means of telecommunication, communicates with

(a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person under subsection 153(1), section 155, 163.1, 170, 171 or 279.011 or subsection 279.02(2), 279.03(2), 286.1(2), 286.2(2) or 286.3(2);

(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person; or

(c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under section 281 with respect to that person.

### **Punishment**

**(2)** Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

### **Presumption re age**

(3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

**No defence**

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

III. Facts

[17] In early 2013, Mr. Morrison placed the following ad on the “Casual Encounters” section of Craigslist:

**Daddy looking for his little girl – m4w – 45 (Brampton)**

Daddy looking for his little girl to meet and have some fun with him during the day next week on Tue. and Wed of this week have the place all to ourselves too, in the Brampton and Knightsbridge area.

(2015 ONCJ 599, at para. 21 (CanLII))

[18] Police Constable Hilary Hutchinson responded to the ad, posing as a 14-year-old girl named “Mia”. From February 5, 2013 until May 21, 2013, Mr. Morrison and “Mia” exchanged messages, as summarized below.

[19] In her initial e-mail response to Mr. Morrison’s ad, “Mia” said she was 14 years old. The conversation soon became sexual in nature, with Mr. Morrison asking

“Mia” what sexual acts she had performed and inviting her to touch herself sexually. The sexualized conversation continued over the following months. At various points, Mr. Morrison suggested to “Mia” that she watch pornography and continued to invite her to touch herself sexually. Mr. Morrison also suggested that “Mia” should skip school and meet him in Brampton, where he would pick her up so they could engage in sexual activity. This meeting did not occur.

[20] During these conversations, “Mia” repeatedly mentioned that she was 14 years old. She used language consistent with her represented age, including common abbreviations and certain misspellings. She also referred to her classes at school, her mom and grandma, and her recreational activities — playing sports, hanging out with her friends, and listening to music. Her messages were sent before and after school hours on weekdays.

[21] On more than one occasion, Mr. Morrison asked “Mia” to send him a photo, but she never did. He also asked for her phone number, which she provided. After a missed call on April 26, 2013, Mr. Morrison ceased contact with “Mia”. On May 10, 2013, “Mia” texted Mr. Morrison, “R U Mad at me?": 2015 ONCJ 599, at para. 21. Almost two weeks later, he replied, “Who are you?": para. 21.

[22] Mr. Morrison was arrested on May 23, 2013 and charged with child luring under s. 172.1(1)(b) of the *Code* — the relevant secondary offence being invitation to sexual touching directed at a person under the age of 16 contrary to s. 152 of the *Code*.

[23] At the time of arrest, Constable Hutchinson informed Mr. Morrison that a complaint had been received from the guardian of a 14-year-old child. In response, Mr. Morrison stated: “I was only talking to one girl” (2015 ONCJ 599, at para. 17 (emphasis deleted)). When he was later interviewed by Constable Hutchinson and told that the police had received a complaint that he was speaking to a 14-year-old girl for a sexual purpose on the Internet, he responded: “So that means you can’t talk to anybody then? OK” (para. 21). When Constable Hutchinson told him that talking to people under a certain age about sexual acts is prohibited, Mr. Morrison replied: “I don’t know whether she was or not so” (para. 21). Mr. Morrison also stated that he was unsure of “Mia’s” age and that, on the Internet, “you don’t really know” whether you are speaking to a child or an adult: 2017 ONCA 582, 350 C.C.C. (3d) 161, at para. 20.

[24] At his trial, Mr. Morrison testified that he believed he was communicating with an adult female engaged in role-play who was determined to stay in character. He also emphasized that the section of Craigslist in which he posted his ad requires users to confirm they are at least 18 years of age. On cross-examination, however, he admitted that this requirement is effectively useless because persons under 18 can get around it simply by clicking a button. He also admitted that he asked “Mia” for a photo to assess her level of attractiveness, not to determine her age.

#### IV. Decisions Below

A. *Ontario Court of Justice (Gage J.)*

(1) Reasons for Charter Ruling (2014 ONCJ 673)

[25] Mr. Morrison brought an application challenging the constitutional validity of the combined operation of s. 172.1(3) and (4) of the *Code* under ss. 11(d) and 7 of the *Charter*.

[26] The trial judge, Gage J., accepted Mr. Morrison's submission that the presumption under s. 172.1(3) violated the presumption of innocence under s. 11(d) of the *Charter*. In his view, a statutory presumption establishing an essential element of the offence will be unconstitutional "unless there exists an inexorable connection between the fact that engages the presumption (here, a representation as to age) and the existence of the essential element (the accused's belief as to the [other person]'s age)": para. 25 (CanLII). Applying this principle, he found no such inexorable connection between the representation and the accused's belief: para. 26. The Crown made no attempt to justify the s. 11(d) infringement. Accordingly, the trial judge held s. 172.1(3) to be of no force and effect in the case before him.

[27] On the other hand, the trial judge held that the reasonable steps requirement under s. 172.1(4) complied with the *Charter*. He concluded that the effect of subs. (4) was merely to impose a tactical burden on the accused; it did not reverse the burden of proof or criminalize innocent behaviour. He therefore found s. 172.1(4) to be constitutionally valid.

(2) Reasons for Conviction (2015 ONCJ 599)

[28] The trial judge then turned to whether Mr. Morrison could be convicted under s. 172.1(1)(b) in the absence of the presumption under s. 172.1(3). He took the view that s. 172.1(1)(b) contemplated two independent pathways to conviction: the Crown had to establish beyond a reasonable doubt that the accused either (1) believed the other person was under the age of 16 or (2) failed to take reasonable steps to ascertain the other person's age.

[29] Beginning with the first potential pathway to conviction, the trial judge stated that he was "satisfied beyond a reasonable doubt that [Mr. Morrison] was at least indifferent to the age of the person he was communicating with": para. 26. He clarified that by "indifferent" he meant "simply not turning his mind to the question in any meaningful way": para. 27. He added, however, that indifference is "not the equivalent of belief", and he clarified that he did not find Mr. Morrison to have been wilfully blind: paras. 26-27. Rather, he considered Mr. Morrison's state of mind to be "closer to negligence rather than the sort of advertence necessary to sustain a finding of an actual belief [o]n his part that Mia was underage": para. 27. In his view, Mr. Morrison's evidence that he believed he was communicating with an adult woman was "sufficient, if barely so, to inspire a reasonable doubt concerning his subjective belief regarding the age of the person with whom he was communicating": para. 28. He reached this conclusion despite his earlier observation that "[Mr.] Morrison's stated assumption that he was dealing with an adult determined to remain in character is an assumption without any supporting foundation": para. 23.

[30] Turning to the second potential pathway to conviction, the trial judge concluded that Mr. Morrison had failed to take reasonable steps to ascertain “Mia’s” age, which in his view was sufficient to enter a conviction. He found that none of the steps Mr. Morrison pointed to as constituting reasonable steps — including posting the ad in an adult-only section of Craigslist, using a specific term of art allegedly relating to a known and popular form of adult role-play (daddy/little girl), asking “Mia” for her age and photos, and the nature of the initial exchange of e-mails being such that only adult persons interested in role-play would continue the dialogue — qualified as reasonable steps. On that basis, he entered a guilty verdict.

(3) Reasons for *Charter* Ruling and Sentence (2015 ONCJ 598, 341 C.R.R. (2d) 25)

[31] Following his conviction, Mr. Morrison renewed his attack on the constitutionality of the reasonable steps requirement under s. 172.1(4) and, in addition, challenged the mandatory minimum of one year’s imprisonment under s. 172.1(2)(a) as infringing s. 12 of the *Charter*.

[32] The trial judge again dismissed the *Charter* challenge to the reasonable steps requirement. However, he concluded that the mandatory minimum under s. 172.1(2)(a) violated s. 12 of the *Charter*. In his view, a four-month sentence followed by a year of probation was a fit sentence in Mr. Morrison’s case, having regard to the circumstances of the offence, including the fact that Mr. Morrison was merely indifferent or negligent as to “Mia’s” age, and Mr. Morrison’s personal situation. In

light of this determination, he held that a sentence of one year would be grossly disproportionate and that the mandatory minimum under s. 172.1(2)(a) was of no force or effect in the case before him.

B. *Court of Appeal for Ontario (Watt, van Rensburg and Pardu JJ.A.) (2017 ONCA 582)*

[33] Justice Pardu, writing for a unanimous panel of the Ontario Court of Appeal, upheld the trial judge's conclusions on all three constitutional issues.

[34] First, the Court of Appeal agreed with the trial judge that s. 172.1(3) infringed s. 11(d) of the *Charter*. It reasoned that, even absent evidence to the contrary, it “does not follow inexorably from proof that the [other person] represented that he or she is underage that the accused believed the representation”, emphasizing that representations on the Internet are “notoriously unreliable” and deception is “rampant”: paras. 59-60. Further, the Court of Appeal concluded that this infringement could not be justified under s. 1 because it was neither minimally impairing nor proportionate. Thus, relying on s. 52(1) of the *Constitution Act, 1982*, it declared s. 172.1(3) to be of no force and effect.

[35] Second, the Court of Appeal agreed with the trial judge that s. 172.1(4) did not infringe s. 7 of the *Charter*. In its view, “if the Crown fails to prove that the accused believed that the other person was underage, the Crown will still obtain a conviction if it proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain the other person's age”: para. 79. The court

acknowledged that the reasonable steps requirement added an “objective dimension” to the fault requirement for child luring: para. 95. It reasoned, however, that although child luring was an offence that carried a high degree of stigma and a severe punishment, it was not one of those exceptional offences that requires a purely subjective standard of fault. For that reason, it found s. 172.1(4) to be constitutionally sound.

[36] Third, the Court of Appeal agreed with the trial judge that the mandatory minimum under s. 172.1(2)(a) was grossly disproportionate when applied to Mr. Morrison. Accordingly, relying on s. 52(1) of the *Constitution Act, 1982*, the Court of Appeal declared the mandatory minimum under s. 172.1(2)(a) to be of no force and effect.

[37] Before this Court, the Crown appeals from the decision of the Court of Appeal, submitting that the court erred in holding that the presumption under s. 172.1(3) and the mandatory minimum under s. 172.1(2)(a) are constitutionally invalid. Mr. Morrison cross-appeals, challenging the Court of Appeal’s conclusion that the reasonable steps requirement under s. 172.1(4) is constitutionally valid.

## V. Issues

[38] The parties raise three main issues:

- (1) Does the presumption under s. 172.1(3) of the *Code* violate s. 11(d) of the *Charter*?
- (2) Does the reasonable steps requirement under s. 172.1(4) of the *Code* violate s. 7 of the *Charter*?
- (3) Does the mandatory minimum sentence of one year's imprisonment under s. 172.1(2)(a) of the *Code* violate s. 12 of the *Charter*?

## VI. Analysis

### A. *The Offence of Child Luring*

[39] Before turning to the three issues raised on appeal, I find it useful to first describe the nature and purpose of the child luring offence. Parliament created this offence to combat the very real threat posed by adult predators who attempt to groom or lure children by electronic means. As this Court explained in *Levigne*, the offence seeks to protect children by “identify[ing] and apprehend[ing] predatory adults who, generally for illicit sexual purposes, troll the Internet to attract and entice vulnerable children and adolescents”: para. 24.

[40] To achieve this purpose, s. 172.1 criminalizes conduct that precedes the commission, or even the attempted commission, of certain designated offences, most of which involve sexual exploitation of children. It thereby creates an essentially inchoate offence — that is, a preparatory crime that captures conduct intended to

culminate in the commission of a completed offence: see *Legare*, at para. 25; *R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173, at para. 20, citing A. Ashworth, *Principles of Criminal Law*, (5th ed. 2006), at pp. 468-70. There is no requirement that the accused meet or even intend to meet with the other person with a view to committing any of the designated offences: see *Legare*, at para. 25. The offence reflects Parliament's desire to "close the cyberspace door before the predator gets in to prey": para. 25.

[41] This Court considered the child luring offence most recently in *Levigne*. There, the accused communicated by computer for a sexual purpose with an undercover officer posing as a 13-year-old boy and was subsequently charged with child luring under s. 172.1 of the *Code*. At trial, he admitted that he had taken no steps to ascertain the other person's age, despite repeated representations by the person that he was underage. The trial judge nevertheless entered an acquittal on the basis that he was left with a reasonable doubt as to whether the accused believed the other person was underage.

[42] The question on appeal was whether the trial judge was bound by the combined effect of s. 172.1(3) and (4) to convict the accused notwithstanding his state of reasonable doubt as to whether the accused believed the other person was underage. The Alberta Court of Appeal held that he was. This Court did the same.

[43] Fish J., for a unanimous Court, explained that the offence of child luring has three essential elements: (1) an intentional communication by means of

telecommunication;<sup>1</sup> (2) with a person who is, or who the accused believes is, under the requisite age; (3) for the purpose of facilitating the commission of a designated offence with respect to that person: para. 23.

[44] He then turned to s. 172.1(3) and (4), which he characterized as “close companion[s]”: para. 3. He noted that under subs. (3), where the person is represented to the accused as being underage, the accused is presumed to have believed that representation, absent evidence to the contrary. The purpose of this provision, he stated, was to “facilitat[e] the prosecution of child luring offences while leaving intact the burden on the Crown to prove guilt beyond a reasonable doubt”: para. 30.

[45] Under subs. (4), he observed, accused persons could not raise the defence that they believed the other person was of legal age unless they “took reasonable steps to ascertain the age of the person.” He characterized the purpose of this provision as being “to foreclose exculpatory claims of ignorance or mistake that are entirely devoid of an objective evidentiary basis”: para. 31.

[46] Fish J. held, at para. 32, that the combined effect of these two subsections “should be understood and applied” in the following manner:

1. Where it has been represented to the accused that the person with whom he or she is communicating by computer (the “interlocutor”) is underage, the accused is presumed to have believed that the interlocutor was in fact underage.

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<sup>1</sup> At the time *Levigne* was decided, the provision referred to communications “by means of a computer system”. However, as noted above, the provision now refers to communications “by a means of telecommunication”.

2. This presumption is rebuttable: It will be displaced by evidence to the contrary, which must include evidence that the accused took steps to ascertain the real age of the interlocutor. Objectively considered, the steps taken must be reasonable in the circumstances.
3. The prosecution will fail where the accused took reasonable steps to ascertain the age of his or her interlocutor and believed that the interlocutor was not underage. In this regard, the evidential burden is on the accused but the persuasive burden is on the Crown.
4. Such evidence will at once constitute “evidence to the contrary” under s. 172.1(3) and satisfy the “reasonable steps” requirement of s. 172.1(4).
5. Where the evidential burden of the accused has been discharged, he or she must be acquitted if the trier of fact is left with a reasonable doubt whether the accused in fact believed that his or her interlocutor was not underage.

[47] In this passage, Fish J. reads subss. (3) and (4) together. He interprets the former to prohibit an accused from rebutting the presumption of belief if the accused did not take reasonable steps to ascertain the other person’s age. In other words, Fish J. reads the reasonable steps requirement in subs. (4) into subs. (3) so as to cohere with the intention of Parliament as he understood it.

[48] From the foregoing — *constitutional considerations aside* — I understand the presumption under subs. (3) and the defence under subs. (4) to operate together as follows. Where the other person is represented to the accused as being underage, the presumption that the accused believed the other person was underage applies. However, this presumption is rebuttable — it will be displaced by evidence to the contrary: para. 32(2). Evidence to the contrary *must* include evidence that the accused took reasonable steps to ascertain the other person’s age: para. 32(2). By

virtue of subs. (4), to raise this defence, the accused bears an initial evidentiary burden of pointing to some evidence capable of showing that he or she took reasonable steps: para. 32(3). The Crown then bears the persuasive burden of proving beyond a reasonable doubt that the accused failed to take such steps: para. 32(3). If the accused fails to discharge his or her evidentiary burden under subs. (4) or if the Crown proves that the accused failed to take reasonable steps, then the presumption under subs. (3) is not rebutted and the accused is conclusively deemed to have believed that the other person was underage: para. 32(2) and (3). In that scenario, the Crown will have met its burden of proving the second element of the offence: that the accused *believed* the other person was underage.

[49] Therefore, under *Levigne*, the combined effect of subss. (3) and (4) is to create two pathways to conviction where the other person is represented as being underage to the accused: the Crown must prove that the accused either (1) believed the other person was underage or (2) failed to take reasonable steps to ascertain the other person's age. In the context of child luring cases involving police sting operations, such as in *Levigne*, where it can be assumed that the undercover police officer posing as a child will represent that he or she is underage, these two pathways to conviction would have been available to the trier of fact.

[50] Importantly, however, the constitutionality of s. 172.1(3) and (4) was not in issue in *Levigne*: see para. 3. In the present appeal, the circumstances are different. This Court is now asked to rule upon the constitutionality of s. 172.1(3) and (4), as well as the constitutionality of the mandatory minimum under s. 172.1(2)(a), for the

first time. I will now consider those issues in turn, beginning with s. 172.1(3) and (4) and assessing how a finding of unconstitutionality in respect of either or both impacts on the analysis in *Levigne*.

B. *The Presumption Under Section 172.1(3)*

(1) Does the Presumption Under Section 172.1(3) Violate Section 11(d) of the Charter?

[51] Section 11(d) of the *Charter* protects the accused's right to be presumed innocent until proven guilty. Before an accused can be convicted of an offence, the trier of fact must be satisfied beyond a reasonable doubt that all of the essential elements of the offence have been proved: see *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 654. This is one of the principal safeguards for ensuring, so far as possible, that innocent persons are not convicted: see *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 13. The right to be presumed innocent is violated by any provision whose effect is to allow for a conviction despite the existence of a reasonable doubt: see *Vaillancourt*, at pp. 654-56; *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, at para. 24.

[52] Various provisions of the *Code* establish presumptions whereby proof of one fact is presumed to be proof of one of the essential elements of an offence. Any such presumption will comply with s. 11(d) solely if proof of the substituted fact leads "inexorably" to the existence of the essential element that it replaces: see *R. v. Whyte*, [1988] 2 S.C.R. 3, at pp. 18-19; *R. v. Downey*, [1992] 2 S.C.R. 10, at pp. 29-

30; *R. v. Audet*, [1996] 2 S.C.R. 171, at para. 44. Only then will there be no possibility that the substitution might result in the accused being convicted despite the existence of a reasonable doubt: see *Audet*, at para. 44.

[53] To be clear, the nexus requirement for demonstrating that a statutory presumption does not offend the presumption of innocence is strict. It is not one of mere “likelihood” or “probability”, nor is it one satisfied by a “common sense” or “rational” inference. Rather, this Court’s jurisprudence demonstrates that the connection between proof of the substituted fact and the existence of the essential element it replaces must be nothing less than “inexorable”. An “inexorable” link is one that necessarily holds true in all cases.

[54] Given the stringency of this test, for reasons that follow, I am satisfied that the presumption under s. 172.1(3) offends s. 11(d) of the *Charter*.

[55] In the context of a sting operation where there is no underage person — which, to be clear, is the specific context to which these reasons are restricted — s. 172.1(1)(b) stipulates that in order to secure a conviction, the Crown must prove beyond a reasonable doubt that, among other things, the accused *believed* the other person was under the age of 16. Subsection 172.1(3), however, creates a presumption that proof that the other person was represented to the accused as being under 16 will, absent evidence to the contrary, stand in for proof of the essential element that the accused believed the other person was under 16.

[56] The Crown maintains that the presumption under s. 172.1(3) does not infringe s. 11(d) because the presumption is rebuttable where there is evidence to the contrary. With respect, I cannot agree. A basic fact presumption will infringe s. 11(d) if proof of the basic fact is not capable, *in itself*, of satisfying the trier of fact beyond a reasonable doubt of the presumed fact. (This is another way of articulating the “inexorable connection” test). The accused’s opportunity to raise or identify evidence to the contrary does not resolve or attenuate the s. 11(d) problem created when proof of a basic fact does not lead inexorably to acceptance of the presumed fact. This is because the presumption of innocence requires that the Crown “establi[sh] the guilt of the accused beyond a reasonable doubt before the accused must respond”: *St-Onge Lamoureux*, at para. 24 (emphasis added); see also *Downey*, at p. 23.

[57] The mere fact that a representation of age was made to the accused does not lead “inexorably” to the conclusion that the accused believed that representation, even absent evidence to the contrary. To be sure, a trier of fact may well infer, on the evidence, that the accused believed the representation. But that is not the test. The test is whether the connection between the proven fact and the existence of the essential element it replaces is “inexorable”. That test is not met here.

[58] Deception and deliberate misrepresentations are commonplace on the Internet: see *R. v. Pengelley*, 2010 ONSC 5488, 261 C.C.C. (3d) 93, at para. 17. As the Court of Appeal in this case aptly put it:

There is simply no expectation that representations made during internet conversations about sexual matters will be accurate or that a participant will be honest about his or her personal attributes, including age. Indeed, the expectation is quite the opposite, as true personal identities are often concealed in the course of online communication about sexual matters. [para. 60]

[59] Here, for example, there is evidence that Mr. Morrison himself made a misrepresentation about his age on the ad he posted: he claimed to be 45 when he was really in his sixties. On the Internet, it may simply be expected that true personal identities are concealed, even when there is no evidence suggesting a misrepresentation in the particular case.

[60] It follows that where a representation of age is made online, the trier of fact could still be left with a reasonable doubt at the close of the Crown's case as to whether the accused believed the other person was underage. Yet, despite the trier of fact's own reasonable doubt, the accused's belief that the other person was underage would be deemed to be established beyond a reasonable doubt by virtue of s. 172.1(3) *unless the accused did something* to rebut the presumption. The presumption in s. 172.1(3) therefore contravenes s. 11(d); it will only be acceptable for an accused to bear a tactical burden to rebut a basic fact presumption where proof of the basic fact leads inexorably to acceptance of the presumed fact.

[61] I pause to note that "evidence to the contrary" under subs. (3) would not include the inherent unreliability of representations made over the Internet; it refers instead to evidence which is specific to the particular circumstances of the accused

and indicates that he or she did not believe the other person was underage. As Fish J. noted in *Levigne*, “evidence to the contrary” must include steps to ascertain the other person’s age: para. 32(2). Further, if “evidence to the contrary” were to be read so broadly as to include the dubious nature of Internet communications or other forms of telecommunication, then the presumption would be rendered meaningless. Since an offence under s. 172.1 necessarily includes some form of telecommunication, the Crown would *never* be able to rely on the presumption because there would *always* be some evidence to the contrary. In my view, this was plainly not Parliament’s intent.

[62] In sum, because proof of a representation as to age does not lead inexorably to the existence of the essential element that the accused believed the other person was underage — even absent evidence to the contrary — the presumption under s. 172.1(3) violates the presumption of innocence under s. 11(d) of the *Charter*.

(2) Can the Infringement Be Saved Under Section 1 of the *Charter*?

[63] Under the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103), a *Charter* infringement can be justified under s. 1 where the party seeking to justify that infringement can demonstrate that:

(1) the law creating the infringement has a pressing and substantial objective; and

(2) the means chosen are proportionate in that:

- (a) they are rationally connected to the law's objective;
- (b) they limit the *Charter* right in question as little as reasonably possible in order to achieve the law's objective; and
- (c) the law's salutary effects are proportionate to its deleterious effects on the affected *Charter* right.

[64] The Crown did not attempt to justify the s. 11(d) infringement under s. 1 at trial. Nonetheless, I will consider the Crown's submissions and explain why, in my view, the *Charter* violation here cannot be justified.

(a) *Pressing and Substantial Objective and Rational Connection*

[65] The purpose of the child luring prohibition as a whole is, as identified above, to protect children by “identify[ing] and apprehend[ing] predatory adults who, generally for illicit sexual purposes, troll the Internet to attract and entice vulnerable children and adolescents”: *Levigne*, at para. 24; see also *Alicandro*, at para. 36 (stating that s. 172.1 “was enacted to protect children against the very specific danger posed by certain kinds of communications via computer systems”). It seeks to “close the cyberspace door before the predator gets in to prey”: *Legare*, at para. 25. This overarching purpose is undoubtedly pressing and substantial: see *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 66.

[66] The main purpose of s. 172.1(3) in particular — which is the focus of the inquiry at this stage (see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995]

3 S.C.R. 199, at para. 144 (“RJR-MacDonald”) — is to facilitate prosecution of the child luring offence: see *Levigne*, at para. 30. The prosecution of child luring offences is connected to the broader objective of protecting children from online sexual predators: see *Alicandro*, at para. 36. The parties agree that s. 172.1(3) has a pressing and substantial objective and that the *Charter* limit it creates is rationally connected to that objective. For present purposes, without finally deciding the issue, I am prepared to accept their concessions in this regard.

(b) *Minimal Impairment*

[67] In my view, however, the presumption under s. 172.1(3) fails the minimal impairment test.

[68] To show minimal impairment, the party seeking to justify the infringement must demonstrate that the impugned measure impairs the right in question “as little as reasonably possible in order to achieve the legislative objective”: *RJR-MacDonald*, at para. 160. The impairment must be “minimal” in the sense that it impairs the right in question “no more than necessary”: para. 160.

[69] Here, the presumption under s. 172.1(3) is designed to facilitate prosecution of the child luring offence, which is connected to the broader objective of protecting children from online sexual predators. But the Crown has failed to establish that, absent the presumption, the child luring provision cannot operate effectively. Where the other person is represented to the accused as being underage,

the trier of fact can, on the basis of evidence (including the record generated by police), draw a logical, common sense inference that the accused believed that representation. The Court of Appeal captured this point well:

At trial, the Crown can ask the trier of fact to infer that the accused believed the [other person] was underage based on all the facts in the record, including: the content of the communication; whether representations as to age were made; the tone of the communications; the nature of the forum used; the frequency of communications; whether photographs were exchanged; and all of the other infinitely variable circumstances surrounding the exchange. This approach is routinely part of the work of trial courts. It need not involve limiting the accused's right to be presumed innocent by means of the presumption of belief in s. 172.1(3) of the *Code*. The absence of the presumption would not undermine the prosecution of the child luring offence. [para. 72]

[70] Put simply, a less intrusive means of achieving the state's overarching objective would be to do away with the presumption under s. 172.1(3) and instead rely on the prosecution's ability to secure convictions by inviting the trier of fact to find, based on a logical, common sense inference drawn from the evidence, that the accused believed the other person was underage. Indeed, this process of inferential reasoning is not unfamiliar to judges and juries, who engage in this type of reasoning day in and day out.

[71] Because the Crown has not shown that the presumption under s. 172.1(3) infringes the right to be presumed innocent "as little as reasonably possible in order to achieve the legislative objective" of prosecuting child luring offences and thereby protecting children from online sexual predators, it cannot be saved under s. 1: *RJR-MacDonald*, at para. 160.

(c) *Balancing*

[72] In addition, I am of the view that the deleterious effects of the presumption under s. 172.1(3) outweigh its salutary effects. As alluded to above, the Crown has not shown that the salutary effects of the presumption are significant, even in the context of an offence as serious as child luring. And to the extent, if any, that the presumption actually results in additional convictions, it does so only by sweeping in accused persons whose belief as to the other person's age may be the subject of a reasonable doubt in the mind of the trier of fact. Although the presumption may ease the Crown's burden of proving its case, prosecutorial convenience and expediency cannot justify the risk of convicting the innocent created by subs. (3).

(3) Conclusion

[73] In sum, the presumption under s. 172.1(3) infringes s. 11(d) of the *Charter*, and that infringement cannot be justified under s. 1. I therefore agree with the Court of Appeal that s. 172.1(3) should be declared to be without force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

C. *The Reasonable Steps Requirement Under Section 172.1(4)*

(1) Does the Reasonable Steps Requirement Under Section 172.1(4) Violate Section 7 of the *Charter*?

[74] Section 7 of the *Charter* establishes that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Mr. Morrison submits that the reasonable steps requirement of s. 172.1(4) violates s. 7 of the *Charter* by allowing for a conviction, and resulting imprisonment, where the accused has simply been negligent in failing to take reasonable steps to ascertain the other person’s age. This, in his view, would deprive him of his liberty in violation of the principles of fundamental justice.

[75] To accord with the principles of fundamental justice, the mental element of an offence must “maintain a proportionality between the stigma and punishment attached to a [conviction for the offence] and the moral blameworthiness of the offender”: *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 646; see also *R. v. Logan*, [1990] 2 S.C.R. 731, at p. 743; H.C. Stewart, *Sexual Offences in Canadian Law* (loose-leaf), at p. 4-27. This Court has recognized that a small group of offences, including murder and attempted murder, carry such stigma and punishment that they require a purely subjective standard of fault: see *Vaillancourt*, at pp. 653-54; *Martineau*, at p. 646; *R. v. Creighton*, [1993] 3 S.C.R. 3, at p. 18. However, “an objective fault requirement is constitutionally sufficient for a broad range of offences” beyond this limited class: *Creighton*, at p. 18.

[76] As discussed above, in *Levigne*, this Court implicitly held that the combined effect of subss. (3) and (4) was to create two pathways to conviction where the other person is represented to the accused as being underage. In such

circumstances, the accused is presumed under subs. (3) to have believed that the other person was underage *unless* there is evidence that the accused took reasonable steps to ascertain the other person's age. In effect, therefore, the required *mens rea* is established where the Crown proves that the accused either (1) believed the other person was underage or (2) failed to take reasonable steps to ascertain the other person's age.

[77] The trial judge proceeded on the basis that although s. 172.1(3) infringed s. 11(d) of the *Charter* and as such was of no force or effect in the case before him, these two pathways to conviction nonetheless remained available. Having been left with a reasonable doubt as to whether Mr. Morrison believed "Mia" was underage, he pursued the second pathway to conviction, finding Mr. Morrison guilty on the basis that he had failed to take reasonable steps to ascertain "Mia's" age as required under s. 172.1(4). The Court of Appeal endorsed this approach.

[78] Mr. Morrison submits that the courts below erred in failing to find that s. 172.1(4) infringes s. 7 of the *Charter*. He maintains that in allowing for a conviction based on a failure to take reasonable steps, subs. (4) makes the child luring offence an objective *mens rea* offence, allowing for convictions based on mere negligence. This, he says, violates the principles of fundamental justice because the stigma and punishment associated with the child luring offence are so serious that subjective *mens rea* alone will suffice to sustain a conviction.

[79] I agree with Mr. Morrison that a conviction for child luring carries a high degree of stigma and a potentially severe punishment. The offence of child luring is punishable by up to 14 years' imprisonment, and the offender is also subject to a lengthy registration as a sex offender. Child luring is a serious crime that undermines the safety of our children and preys on their vulnerability. The stigma and punishment that attach to a conviction are thus rightfully high and severe. That said, I am very doubtful that this stigma and punishment rise to the level of requiring purely subjective *mens rea*. In any event, for reasons that will become apparent, I find it unnecessary to decide that issue here.

[80] In short, I reject Mr. Morrison's submission that s. 172.1(4) breaches s. 7 of the *Charter*.<sup>2</sup> In reaching this conclusion, I part ways with the courts below in the following key respect: in my view, the reasonable steps requirement under s. 172.1(4) does *not*, in the absence of the presumption under s. 172.1(3), provide a second pathway to conviction. Instead, as I will explain, it simply limits a defence.

[81] As noted above, in the context of a police sting operation where there is no underage person, s. 172.1(1) makes it an offence for a person to communicate, by means of telecommunication, with a person who the accused *believes* is underage for the purpose of facilitating the commission of a designated offence against that person.

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<sup>2</sup> No argument was made before this Court on whether the limit on the accused's ability to raise the defence that he believed the other person was of legal age violates the presumption of innocence under s. 11(d) of the *Charter*. Importantly, we do not have the benefit of the Crown's arguments on this point, making it inappropriate for this Court to pronounce on the matter: see *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, at para. 28. Mr. Morrison argued that s. 172.1(4) is unconstitutional on the basis that it allows for conviction on the basis of mere negligence.

By expressly including a presumption under s. 172.1(3) as to the accused's belief in this regard — albeit a presumption which I have found to be unconstitutional — Parliament signalled that the requirement of proving belief is essential in this context.

[82] Subsection 172.1(4) does not make this requirement any less essential. Rather, in the absence of the presumption under s. 172.1(3), what it does is bar accused persons from raising, as a defence, that they believed the other person was of legal age where they failed to take reasonable steps to ascertain the other person's age. Put differently, it does not provide an independent pathway to conviction; it merely limits a defence. This proposition is made clear by the opening words of subs. (4): "It is not a defence . . . ." To be clear, while the word "defence" can be understood more broadly or more narrowly depending on the context, I am of the view that "defence" here is referring to an *affirmative* defence advanced by the accused as to the accused's belief that would entitle him or her to an acquittal if believed or if it were to leave the trier of fact in a state of reasonable doubt.

[83] Consequently, if the Crown proves beyond a reasonable doubt that the accused did not take reasonable steps, then the trier of fact is precluded from considering the defence that the accused believed the other person to be of *legal age*. But that does not relieve the Crown of its ultimate burden of proving beyond a reasonable doubt that the accused believed the other person was *underage*. Thus, to illustrate, if the trier of fact can only conclude from the evidence that the accused was negligent or reckless with regard to the other person's age, the Crown would not have met its burden, and the accused would be entitled to an acquittal. This is because

negligence and recklessness are states of mind that do not entail any concrete belief about the other person's age. In short, there is but one pathway to conviction: proof beyond a reasonable doubt that the accused believed the other person was underage. Nothing less will suffice.

[84] To the extent my colleague Justice Abella concludes otherwise, I respectfully disagree. In the sting context where there is no actual underage person, the notion that “s. 172.1(4) allows for a conviction if the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain age (the objective path to liability)” simply does not hold up: Abella J.’s reasons, at para. 214. If proving the absence of reasonable steps were sufficient to ground a conviction in this context, there would have been no need for the presumption under subs. (3) in the first place. As explained above, absent that presumption, subs. (4) does nothing more than limit a defence. The main effect of subs. (4), discussed in further detail below, is to impose an evidentiary burden on the accused regarding reasonable steps where the accused asserts he or she believed the other person was of legal age: see *Levigne*, at para. 32(3). It is the Crown, however, that bears the persuasive burden: see para. 32(3). In my respectful view, nothing in this arrangement prevents an accused from making full answer and defence.

[85] It is trite that an accused's failure to discharge an evidentiary burden vis-à-vis a defence does not, in and of itself, provide a freestanding basis for conviction, irrespective of whether the Crown has proven its case beyond a reasonable doubt. If it were otherwise, a bedrock principle of criminal law — namely, that in order to secure

a conviction, the Crown must prove all of the essential elements of the offence beyond a reasonable doubt — would be stripped of any meaning: see *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, at p. 532. In the sting context where there is no actual underage person, which is the context with which we are concerned, that principle requires that the Crown prove beyond a reasonable doubt that the accused believed the other person was underage.

[86] In so concluding, I am not unmindful of the comments in *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 8, upon which Justice Abella relies by way of analogy to hold that in the present context the Crown can obtain a “conviction if [it] proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain age (the objective path to liability)”: paras. 213-14. Paragraph 8 of *George* reads as follows:

At common law, “true crimes” — like those at issue here — would have a purely subjective fault element. However, through statutory intervention, Parliament has imported an objective element into the fault analysis to enhance protections for youth (Stewart, at pp. 4-23 and 4-24). As a result, to convict an accused person who demonstrates an “air of reality” to the mistake of age defence, the Crown must prove, beyond a reasonable doubt, either that the accused person (1) did not honestly believe the complainant was at least 16 (the subjective element); or (2) did not take “all reasonable steps” to ascertain the complainant’s age (the objective element) (Stewart, at p. 4-24; M. Manning, Q.C., and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 1113 (“*Manning, Mewett & Sankoff*”)).

[87] With respect, I am unable to adopt my colleague’s analysis. In *George*, Ms. George was charged with sexual interference and sexual assault of a person under

the age of 16. Given that the complainant was legally incapable of consenting, Ms. George's sole defence was that she believed, albeit mistakenly, that the 14-year-old complainant was at least 16 years old. In those circumstances, if the trier of fact were to find or have a reasonable doubt that Ms. George honestly believed the complainant was at least 16, she would be entitled to an acquittal. Put differently, if the Crown hoped to obtain a conviction, it had to overcome her defence of mistaken belief.

[88] Against this backdrop, the passage in question at para. 8 of *George* explains that there were two alternate ways by which the Crown could negate the defence of mistaken belief in age once the air of reality test had been met. First, the Crown could prove that the accused did not honestly believe the complainant was at least 16; or, second, the Crown could prove that the accused did not take "all reasonable steps" to ascertain the complainant's age. While the Crown had to prove at least one of these propositions to negate the defence of mistaken belief, doing so would not, from a legal perspective, inevitably lead to a conviction. As a legal matter, to obtain a conviction for sexual interference or sexual assault of a person under the age of 16, the Crown had to go further and prove beyond a reasonable doubt that the accused believed the complainant was under 16. As a practical matter, once Ms. George's sole defence was negated, her conviction was a virtual certainty.

[89] These same legal principles apply in respect of the offence of child luring. The best evidence of this is found in the s. 172.1(3) presumption, which Parliament built into the child luring provision. As I have pointed out above at para. 84, if proving the absence of reasonable steps and thereby disproving the defence of honest

belief in age were sufficient to ground a conviction in this context, there would have been no need for Parliament to include the presumption under s. 172.1(3) in the first place. This goes against the presumption that Parliament does not speak in vain: see *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 87.

[90] Put simply, as a matter of law, an accused cannot be convicted merely for failing to establish a defence; rather, a conviction will be sustained only where the Crown is able to negate a properly raised defence *and* show, on the evidence as a whole, that all of the essential elements of the offence in question have been proved beyond a reasonable doubt.

[91] I offer this clarification, bearing in mind that the comments enunciated in para. 8 of *George* were clearly not central to the resolution of that case. The issue of whether an accused could be convicted for failing to show that he or she took all reasonable steps to ascertain the complainant's age was in fact neither raised nor argued by the parties. In the absence of full argument and a considered analysis, the passage in question ought not to be interpreted in a way that would sweep aside a bedrock principle of our criminal law.

(2) Conclusion

[92] It follows from the foregoing analysis that s. 172.1(4) does not infringe s. 7 of the *Charter*. This is because even if we were to assume, for the sake of argument, that child luring forms part of the very narrow class of offences requiring purely subjective *mens rea*, s. 172.1(4) does not depart from this standard: it does not create a situation in which an accused may be convicted on the basis of simple negligence — namely, in this context, a failure to take reasonable steps. Rather, only subjective *mens rea* — in this case, belief — will suffice.

[93] It also follows that the trial judge entered a guilty verdict on a basis that was legally unsound. For the trial judge to have properly convicted Mr. Morrison, he would have to have been satisfied beyond a reasonable doubt that Mr. Morrison believed “Mia” was under the age of 16. He was not. This demands a remedy.

[94] But before turning to the question of remedy, it is first necessary to describe how s. 172.1 is to be applied in future cases in the absence of the presumption under s. 172.1(3), which I have found to be of no force and effect.

#### D. *The Operation of Section 172.1 Without Section 172.1(3)*

##### (1) Belief Regarding Age

[95] In the context of a police sting where there is no underage person, the offence of child luring has three essential elements: (1) an intentional communication by means of telecommunication; (2) with a person who the accused believes is under

the requisite age; (3) for the purpose of facilitating the commission of a designated offence with respect to that person (see *Levigne*, at para. 23; *Legare*, at para. 36). The Crown must prove each of these elements beyond a reasonable doubt: see *Legare*, at para. 37. The discussion below will focus on the second element.

[96] Because the presumption under s. 172.1(3) is no longer of any force or effect, the Crown cannot secure a conviction by proving that the accused failed to take reasonable steps to ascertain the other person's age once a representation as to age was made. Instead, the Crown must prove beyond a reasonable doubt that the accused *believed* the other person was underage.

[97] To meet this burden, the Crown must show that the accused either (1) believed the other person was underage or (2) was wilfully blind as to whether the other person was underage. The second alternative is legally equivalent to the first.

[98] Wilful blindness exists where an accused's "suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries": *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 21 (emphasis in original). Wilful blindness has been characterized as "deliberate ignorance" because it connotes "an actual process of suppressing a suspicion": D. Stuart, *Canadian Criminal Law: A Treatise* (7th ed. 2014), at p. 261. "A court can properly find wilful blindness only where it can almost be said that the defendant actually knew": *Briscoe*, at para. 23, citing G. Williams, *Criminal Law: The General Part* (2nd ed. 1961), at p. 159. This Court has repeatedly held that if an accused is

found to be wilfully blind, that state of mind may substitute for actual knowledge: *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at pp. 584-85; *Briscoe*, at para. 21. Indeed, it is “equivalent to knowledge”: *Briscoe*, at para. 23, citing Williams, at p. 159.

[99] Further, where a person *knows* something, then for legal purposes they necessarily *believe* it: *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 69. If wilful blindness is sufficient to establish knowledge, then it follows logically that wilful blindness can stand in for belief as well. Therefore, if the trier of fact is satisfied that the accused was *wilfully blind* as to whether the other person was underage, then the trier of fact will necessarily be satisfied that the accused *believed* the other person was underage.

[100] For greater clarity, I pause here to note that although the two concepts are often conflated, recklessness is distinct from wilful blindness: *Sansregret*, at pp. 584-85; *Briscoe*, at para. 23. Recklessness refers to the state of mind of a person who, “aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk”: *Sansregret*, at p. 582. By contrast, wilful blindness “arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant”: p. 584.

[101] In the context of a police sting where there is no underage person, a showing that the accused was merely reckless, rather than wilfully blind, as to

whether the other person was underage will not ground a conviction. In a sense, this distinguishes the child luring offence from the offence of sexual assault. The required *mens rea* for sexual assault is established where the accused is reckless with regard to a lack of consent on the part of the person sexually touched: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 42; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 24. An accused's awareness that there is a risk that the complainant has not consented to the sexual touching, and the accused's persistence despite this risk, is sufficient to make out the requisite mental element. In the child luring context, however, 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.

[102] In sum, in order to establish the second element outlined above in the context of a police sting where there is no underage person, the Crown must prove beyond a reasonable doubt that the accused (1) believed the other person was underage or (2) was wilfully blind as to whether the other person was underage.

(2) The Defence of Belief That the Other Person Was of Legal Age

[103] In *Levigne*, this Court affirmed that if the trier of fact is left in a state of reasonable doubt as to whether the accused believed the other person was of legal age, then the accused is entitled to an acquittal: see para. 32(5). Subsection 172.1(4), however, stipulates that the defence that the accused believed the other person was of legal age can be raised only if the accused took reasonable steps to ascertain the other

person's age. To be clear, this provision does not require that the accused's belief be both honest *and* reasonable; rather, it simply requires that there be some objective evidence capable of supporting an honest belief.

[104] With this in mind, the novel issue before us is how this defence operates in the absence of the presumption under s. 172.1(3), which, again, is no longer of any force or effect.

(a) *What Are Reasonable Steps Under Section 172.1(4)?*

[105] In my view, the “reasonable steps” that the accused is required to take under subs. (4) are steps that a reasonable person, in the circumstances known to the accused at the time, would take to ascertain the other person's age: see *R. v. Dragos*, 2012 ONCA 538, 111 O.R. (3d) 481, at paras. 31-32. The reasonable steps requirement therefore has both objective and subjective dimensions: the steps must be objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time. Although the words “in the circumstances known to the accused at the time” do not appear in s. 172.1(4), courts have drawn an analogy between s. 172.1(4) and the requirement under s. 273.2(b) that the accused take “reasonable steps, in the circumstances known to the accused at the time” in order to make out the defence of mistaken belief in consent against a charge of sexual assault: see *Dragos*, at paras. 39-41. In my view, it is appropriate to incorporate this qualifier because the reasonable steps requirement is highly contextual, and what may qualify as reasonable steps in one case may not in another:

see *R. v. Thain*, 2009 ONCA 223, 243 C.C.C. (3d) 230, at para. 37; *Dragos*, at paras. 32 and 41; *Pengelly*, at para. 9.

[106] In *Levigne*, this Court stated that the purpose of the reasonable steps requirement in s. 172.1(4) is to bar the accused from claiming a defence based on an asserted belief that is “entirely devoid of an objective evidentiary basis”: para. 31. Taking into account this purpose, in my view, reasonable steps are steps that provide information reasonably capable of supporting the accused’s belief that the other person was of legal age. Put simply, reasonable steps must be *meaningful*. For example, relying on the fact that a *public* chat room is monitored by moderators who may remove children cannot constitute a reasonable step when the accused was using a *private* chat room to make the relevant communications: see *Levigne*, at para. 42. Such a step is entirely meaningless.

[107] In the same vein, a step that solicits information that does not in fact reasonably support a belief that the other party is of legal age cannot constitute a reasonable step. If the accused asked for the other person’s age — which might, depending on the response, form evidence of reasonable steps — but was told she was 13, that inquiry cannot constitute a reasonable step: see *Levigne*, at para. 43. Again, such a step is not meaningful. It cannot support a belief that the other person is of legal age. The same applies where the accused receives an ambiguous response or no response at all. Thus, one must consider not only the nature of the steps taken, but also the information — or lack thereof — that they solicit: see *R. v. Ghotra*, 2016 ONSC 1324, 334 C.C.C. (3d) 222, at paras. 106 and 108.

[108] Relatedly, if the accused takes some initial steps that could reasonably support a belief that the other person is of legal age, but “red flags” are subsequently raised suggesting he or she may not be, then the accused may be required to take additional steps to ascertain the other person’s age: see *Dragos*, at paras. 62-64 and 66. If the accused takes no such additional steps, then he or she may be found not to have satisfied the reasonable steps requirement. The requirement is thus an ongoing one.

[109] Reasonable steps need not be “active”: see *Dragos*, at para. 62; *Ghotra*, at paras. 105, 139 and 153. The line between active and passive steps is not always easily drawn and may amount to little more than semantics. Whether we characterize certain steps as “passive” or “active” is of no moment. In my view, there is no compelling reason, whether in a sting context or otherwise, for foreclosing the notion that arguably “passive” conduct — such as the receipt and consideration of unsolicited information — could provide information reasonably capable of supporting the accused’s belief that the other person was of legal age.

[110] Further, Parliament has not required the accused to take “all” reasonable steps: see *Pengelly*, at para. 11; *Ghotra*, at para. 139. Accordingly, the accused is not required to exhaust all potential reasonable steps in order to invoke the defence. There is no magic number of steps that the accused must take. In some cases, a single, decisive step may suffice; in others, multiple steps may be required. As with all legal tests that apply across a broad range of factual circumstances, context is crucial.

[111] It is also worth emphasizing that the reasonable steps requirement should be applied with a healthy dose of common sense. Trial judges and juries should adopt a practical, common sense approach to the reasonable steps requirement, bearing in mind its overarching purpose: to bar an accused from raising a defence based on an asserted belief that is “entirely devoid of an objective evidentiary basis” (*Levigne*, at para. 31).

[112] Without purporting to offer an exhaustive list, reasonable steps may, depending on the circumstances, include: asking for the other person’s age and receiving a response that supports that accused’s asserted belief; noting the other person’s representation, whether solicited or unsolicited, that he or she is of legal age; asking for and receiving proof of identification indicating that the other person is of legal age; asking for and receiving a photograph or reviewing profile pictures suggesting the other person is of legal age; observing conduct or behaviour suggesting the other person is of legal age; choosing to communicate through a website that enforces age restrictions; and, in the case of a personal ad, including language indicating that the accused is looking to speak only with adults. The ultimate question is whether, in the totality of the circumstances, the accused’s steps to ascertain the other person’s age were sufficient to constitute “reasonable steps” — namely, those that provide information that is reasonably capable of supporting the accused’s belief that the other person was of legal age.

[113] In sum, the approach to assessing reasonable steps is a highly contextual one that accounts for the setting in which the communications take place: the Internet.

[114] To the extent that my colleague Justice Abella maintains that the reasonable steps requirement “may prove impossible to meet” (Abella J. reasons, at para. 196), I cannot agree. As I have explained, the words “reasonable steps” are to be given broad scope. As such, they come nowhere close to creating a “nearly insurmountable barrier to the accused’s ability to raise and defend his or her innocent belief”: Abella J.’s reasons, at para. 217. My colleague poses the question, “What steps can an accused possibly take on the Internet to reasonably verify the communicant was not under the relevant age . . . ?”: para. 217. With respect, the answer is found above at paras. 105-12 of my reasons.

[115] Furthermore, I respectfully do not share my colleague’s concern that good faith communications aimed at ascertaining whether the other person is of legal age might themselves be found to constitute child luring: see paras. 222-23. To be captured under s. 172.1(1), the communication at issue must have been made *for the purpose of facilitating the commission of a designated secondary offence*. Good faith communications aimed at ascertaining whether the other person is of legal age fall outside the scope of this prohibition. To illustrate, a simple request for a photo, when taken as a precautionary measure for ensuring the other person is of legal age, would not be caught by s. 172.1(1) and may qualify as evidence of reasonable steps. By contrast, the same request, when made for the purpose of facilitating the commission of a designated secondary offence, would fall within the ambit of s. 172.1(1). While these two scenarios involve the same act, the different purposes for which the act is performed are worlds apart, and the evidence necessary to support an inference that

the request was made to facilitate the commission of a designated secondary offence would be absent where the request was made in good faith.

[116] With all this in mind, the defence that the accused believed the other person was of legal age would operate in practice as follows:

- (a) First, in order to raise the defence, the accused bears the evidentiary burden of pointing to *some* evidence from which it may be found that he or she took reasonable steps and honestly believed the other person was of legal age: see *Levigne*, at para. 32(3). In other words, the accused must show that the defence has an “air of reality”.
- (b) Second, if the accused discharges his or her evidentiary burden, the defence is left with the trier of fact, and the Crown then bears the persuasive burden of disproving the defence beyond a reasonable doubt: see *Levigne*, at para. 32(3). However, this does not mean that in order to obtain a conviction, the Crown must prove beyond a reasonable doubt that the accused failed to take reasonable steps.
- (c) Third, regardless of whether the defence can be considered, the trier of fact must ultimately determine whether the Crown has proven beyond a reasonable doubt that the accused believed the other person was underage. Thus, at the end of the day, whether the accused is convicted or acquitted does not hinge on whether the accused took

reasonable steps; it hinges on whether the Crown can prove culpable belief beyond a reasonable doubt.

[117] I will address each of these stages in turn.

(b) *Step 1: Does the Defence Have an Air of Reality?*

[118] The first step is for the trial judge to determine whether there is an “air of reality” to the defence. A defence has an air of reality if a properly instructed jury acting reasonably could acquit the accused on the basis of the defence: see *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 2. If the defence has no air of reality — that is, there is no evidentiary basis on which the defence can rest — then it must not be left with the jury: see *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at pp. 126-27; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 648, per McLachlin J. (dissenting, but not on this point); *R. v. Park*, [1995] 2 S.C.R. 836, at paras. 11-13.

[119] In my view, the defence that the accused believed the other person was of legal age has an air of reality only if the trier of fact could find, on the evidence, that the accused took steps capable of amounting to “reasonable steps” in the circumstances to ascertain the other person’s age and that the accused honestly believed the other person was of legal age. In other words, the accused will only meet the air of reality threshold if he or she can point to evidence capable of supporting findings that:

- a) the accused took steps to ascertain the other person's age;
- b) those steps were reasonable; *and*
- c) the accused honestly believed the other person was of legal age.

[120] In particular, this means that the defence of honest belief in legal age will not be in play if there is no evidence capable of satisfying the “reasonableness” requirement (2). If the accused cannot discharge this evidentiary burden, then the defence will not be left with the trier of fact. In those circumstances, in the context of a jury trial, the trial judge should provide a limiting instruction that because the accused failed to take reasonable steps to ascertain the other person's age, the jury is precluded, as a matter of law, from considering the defence of honest belief in legal age. In that event, as described more fully under “Step 3” below, the sole question the jury must consider is whether — on the whole of the evidence, including the evidence relating to the accused's failure to take reasonable steps — the Crown has established, beyond a reasonable doubt, that the accused believed the other person was underage.

[121] Where the accused has failed to point to any steps capable of amounting to reasonable steps in the circumstances, this may be a good indication that the accused believed the other person was underage or was wilfully blind as to whether the other person was underage. However, even if the defence lacks an air of reality, this is not necessarily determinative of the accused's belief. The Crown continues to bear the burden of proving beyond a reasonable doubt that the accused believed the other person was underage. Where the defence is unavailable, even though the trier of

fact will be precluded from considering the defence, the evidence as a whole may leave gaps or weaknesses in the Crown's case that could give rise to a reasonable doubt as to whether the Crown has met its burden of showing that the accused believed the other person was underage.

[122] Conversely, if the trial judge determines that the defence has an air of reality, then it will be left with the trier of fact. Meeting this evidentiary burden does not require the accused to take the stand; the accused could instead point to evidence adduced by the Crown, such as the content of the relevant telecommunications or police interviews, demonstrating that there is an air of reality to the defence.

*(c) Step 2: Has the Crown Disproved the Defence?*

[123] If the accused discharges his or her evidentiary burden and the defence that the accused believed the other person was of legal age is left with the trier of fact, then the Crown bears the persuasive burden of disproving the defence: see *Levigne*, at para. 32(3); see also M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 397. This means that in order to rebut the defence, which is one of honest belief in legal age, the Crown must disprove it beyond a reasonable doubt. However, it is important to understand the role played, and not played, by reasonable steps in this analysis.

[124] If the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps, then the accused will be barred from relying on the defence of

honest belief in legal age. This is consistent with the wording of subs. (4), which uses the language “[i]t is not a defence”. Therefore, it is only the accused’s ability to raise the defence that is affected where the Crown disproves reasonable steps. This does not relieve the Crown of its burden of proving beyond a reasonable doubt that the accused believed the other person was underage.

[125] Conversely, if the Crown cannot disprove reasonable steps beyond a reasonable doubt, then the accused can raise the defence of honest belief in legal age. However, even where the defence is in play, the Crown will still obtain a conviction if it proves beyond a reasonable doubt that the accused believed the other person was underage. In other words, the Crown is not required to disprove reasonable steps beyond a reasonable doubt to obtain a conviction.

[126] Thus, put simply, whether the accused is convicted or acquitted does not hinge on whether the accused took reasonable steps; it hinges on whether the Crown can prove the accused’s belief beyond a reasonable doubt. The presence or absence of reasonable steps is not essential for either conviction or acquittal — in short, it is not the “be-all and end-all”. Instead, the reasonable steps requirement is simply a threshold requirement for raising the defence of honest belief in legal age. That is, it limits a defence that, if believed or found to raise a reasonable doubt, would entitle the accused to an acquittal. Without s. 172.1(4), the defence of honest belief in legal age could be relied upon regardless of whether the accused took reasonable steps.

[127] To illustrate how these principles would apply in practice, if the Crown fails to disprove reasonable steps, then the defence is available to the accused and the trier of fact may — or may not — infer from the evidence, including the evidence of reasonable steps, that the accused believed the other person was of legal age. The mere failure to disprove reasonable steps does not, however, guarantee that the defence of honest belief in legal age will succeed. This is because the trier of fact may disbelieve the accused based on credibility findings or based on a consideration of the totality of the evidence. For example, where the accused has taken reasonable steps, but the evidence shows that the accused made statements to a third party that he or she was in a relationship with a 14-year-old, the Crown may well succeed in establishing that the accused had the requisite belief to sustain a conviction.

[128] By contrast, if the Crown does succeed in disproving reasonable steps, then the defence of honest belief in legal age will fail. In that event, in the context of a jury trial, the trial judge should provide the limiting instruction set out at para. 120 above.

*(d) Step 3: Has the Crown Proven That the Accused Believed the Other Person Was Underage?*

[129] As explained above, where the Crown establishes that the accused failed to take reasonable steps, s. 172.1(4) bars accused persons from raising, as a defence, that they believed the other person was of legal age. But a conviction cannot rest *solely* on this basis; without the presumption under subs. (3), the reasonable steps

requirement under subs. (4) does not provide an independent pathway to conviction. Therefore, the inquiry does not end if and when the Crown establishes that the accused did not take reasonable steps. Instead, the trier of fact would then be required to consider the whole of the evidence, including the evidence relating to the accused's failure to take reasonable steps, not to reintroduce the defence of honest belief in legal age, but in determining whether the Crown has discharged its legal burden of establishing that the accused *believed* the other person was *underage*. Only if that element is proven can a conviction be entered.

[130] With this in mind, where an accused has failed to take reasonable steps, the trial judge must instruct the jury that the accused's evidence that he or she believed the other person was of legal age *cannot* be considered in determining whether the Crown has proven its case beyond a reasonable doubt. This instruction is essential — it guards against the risk that an acquittal may result based on an assertion that is devoid of any objective basis in the evidence. Thus, put simply, where reasonable steps have not been taken, an accused's evidence that he or she believed the other person was of legal age is without any value, and the jury cannot rely on that evidence when assessing the strength of the Crown's case.

[131] There are circumstances in which, despite the absence of reasonable steps, the Crown may nonetheless fail to prove beyond a reasonable doubt that the accused believed the other person was underage. For example, the trier of fact may determine that the accused was merely aware of a risk that the other person was

underage (i.e., was reckless), or was merely negligent. Neither of these findings could ground a conviction.

[132] Equally, there are circumstances in which, despite the reasonable steps requirement having been satisfied, the Crown may still succeed in proving beyond a reasonable doubt that the accused believed the other person was underage. For example, as illustrated above, there may be evidence that the accused made statements to a third party that indicate he or she had the belief necessary to sustain a conviction.

[133] In sum, it is the third step in the analysis — whether the Crown has proven beyond a reasonable doubt that the accused believed the other person was underage — that is the question of ultimate consequence.

#### E. *Application and Remedy*

[134] Having outlined the proper approach to interpreting and applying s. 172.1 in the absence of the presumption under s. 172.1(3), I return to Mr. Morrison’s case.

[135] As indicated, although the trial judge was left with a reasonable doubt as to whether Mr. Morrison believed “Mia” was under the age of 16, he nonetheless convicted Mr. Morrison on the basis that he failed to take reasonable steps. However, as I have pointed out, this conclusion was legally unsound. A failure to take reasonable steps does not constitute an independent pathway to conviction in the

absence of the presumption under subs. (3). To support a conviction, the Crown had to prove beyond a reasonable doubt that Mr. Morrison believed “Mia” was under 16. The trial judge found that it did not. Accordingly, Mr. Morrison’s conviction cannot stand.

[136] This leaves the question of remedy — namely, whether Mr. Morrison is entitled to an acquittal or instead must face a new trial, should the Crown choose to retry him.<sup>3</sup> For reasons that follow, I would order a new trial, despite the trial judge’s finding that the evidence was “sufficient, if barely so, to inspire a reasonable doubt concerning [Mr. Morrison’s] subjective belief regarding the age of the person with whom he was communicating”: 2015 ONCJ 599, at para. 28.

[137] As I have explained, the trial judge proceeded on the erroneous understanding that Mr. Morrison could be convicted on the basis that he failed to take reasonable steps. The legal framework the trial judge applied was therefore incorrect. It follows, in my view, that his conclusion that he was left with a reasonable doubt as to whether Mr. Morrison believed “Mia” was under 16 — a conclusion that would ordinarily result in an acquittal — must be treated with considerable caution, as it may well have been tainted by his erroneous understanding that a conviction could still be entered on another basis. This concern is a very real one here because, as I will explain, the trial judge’s finding that Mr. Morrison was “indifferent” as to

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<sup>3</sup> Technically, there is a third option: Mr. Morrison’s conviction could be upheld on the basis of s. 686(1)(b)(iii) of the *Code*. However, I am of the view that it would be inappropriate to do so here, as the Crown has not requested that this Court apply the curative proviso and Mr. Morrison has not had the opportunity to make submissions based on how the correct legal framework should be applied to his case.

“Mia’s” age was not only unsupported by any objective evidence; it also ran contrary to Mr. Morrison’s sworn testimony, the sole basis for the trial judge’s conclusion.

[138] In his reasons, the trial judge observed that Mr. Morrison’s “stated assumption that he was dealing with an adult determined to remain in character” was “an assumption without any supporting foundation”: para. 23 (emphasis added). He further acknowledged that Mr. Morrison’s testimony in this regard was the “only thing standing in the way” of finding that he believed “Mia” was underage: para. 24 (emphasis added). The remainder of the evidence “suggest[ed] that Morrison believed he was in fact communicating with a fourteen-year-old female”: para. 23.

[139] Despite having made these observations, the trial judge nevertheless went on to conclude, based solely on Mr. Morrison’s unsupported testimony, that Mr. Morrison was “indifferent” to “Mia’s” age, in the sense of “simply not turning his mind to the question in any meaningful way”: paras. 26-27. As such, he was left in a state of reasonable doubt as to Mr. Morrison’s belief: paras. 27-28.

[140] The trial judge’s crucial finding that Mr. Morrison was indifferent to “Mia’s” age had no basis in Mr. Morrison’s testimony, the sole evidence upon which he purported to rely. At no point did Mr. Morrison testify that he did not turn his mind to “Mia’s” age. Nor did he make any concession to that effect in cross-examination. Mr. Morrison consistently affirmed that he believed “Mia” was an adult woman — a belief that the trial judge found to be without any supporting foundation. Thus, in concluding that Mr. Morrison was indifferent to “Mia’s” age, the trial judge

not only relied exclusively on evidence he found to be unsupported; he used that evidence to ground a conclusion it could not logically sustain and, in fact, directly contradicted. In determining the appropriate remedy, this gap in logic cannot be overlooked.

[141] If this were a situation in which the Crown's case was weak, an order for a new trial would arguably be unwarranted. But here, the Crown's case was anything but weak. Without commenting further on the matter, I note that the record discloses evidence strongly indicating that a trier of fact could find beyond a reasonable doubt that Mr. Morrison believed "Mia" was underage or was wilfully blind as to whether she was underage. For example, as detailed in paras. 19-24 above:

- "Mia" indicated on numerous occasions that she was 14 years old.
- She used language and discussed topics consistent with her represented age.
- Mr. Morrison offered to pick "Mia" up near her school to engage in sexual activity.
- Upon arrest, Mr. Morrison made several statements that could reasonably be interpreted as demonstrating that he believed "Mia" was underage.
- In cross-examination, Mr. Morrison admitted that the requirement that users must indicate that they are over 18 years old in order to access the relevant section of Craigslist is effectively useless.
- Mr. Morrison further admitted that he asked "Mia" for a photo to assess her level of attractiveness, not to determine her age.

[142] For these reasons, considerations of fairness — including fairness to the public and the integrity of the justice system — favour a new trial, one that is conducted using a correct legal framework. Accordingly, I would order a new trial.

F. *The One-Year Mandatory Minimum Sentence Under Section 172.1(2)(a)*

[143] Finally, Mr. Morrison challenges the mandatory minimum sentence of one year's imprisonment under s. 172.1(2)(a) as infringing the right not to be subjected to cruel and unusual punishment under s. 12 of the *Charter*. There is a high bar to establishing cruel and unusual punishment under s. 12: *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 39; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 24. A mandatory minimum sentence infringes s. 12 if it imposes a grossly disproportionate sentence — that is, a sentence that is “so excessive as to outrage standards of decency” and “abhorrent or intolerable” to society, but not one that is merely excessive: *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072, citing *Miller v. The Queen*, [1977] 2 S.C.R. 680, at p. 688; *Lloyd*, at para. 24, citing *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 26.

[144] As this Court articulated in *Nur*, two questions arise when a mandatory minimum is challenged under s. 12. First, the court must assess whether the provision results in a grossly disproportionate sentence when applied to the offender before the court. If it does not, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on other offenders: see para. 77.

[145] In my view, it would be unwise to rule on the constitutional validity of the mandatory minimum under s. 172.1(2)(a) in this appeal. The courts below proceeded on the mistaken understanding that Mr. Morrison could be convicted on the basis of mere negligence — that is, his failure to take reasonable steps — and their conclusions on the s. 12 issue rested, at least in part, on this mistaken understanding: see 2015 ONCJ 598, at paras. 70, 72, 91 and 93-94; C.A. reasons, at paras. 121 and 131-34. Similarly, the four-month sentence imposed by the trial judge was influenced by his mistaken understanding that s. 172.1(4) can be read so as to allow for a conviction absent proof of subjective *mens rea*. I would also note that the parties did not have the opportunity to make submissions on the constitutionality of the mandatory minimum with the benefit of a clear statement from this Court as to the *mens rea* required for a conviction. In these circumstances, any final determination of the s. 12 issue is best left to the trial judge at the new trial, should Mr. Morrison be convicted again.

[146] I would, however, offer the following comments. On the one hand, several features of s. 172.1 suggest that the mandatory minimum under subs. (2)(a) is, at the very least, constitutionally suspect. Subsection 172.1(2) “casts its net over a wide range of potential conduct”, making it potentially vulnerable to constitutional challenge given the range of reasonably foreseeable applications of the mandatory minimum: *Nur*, at para. 82; *Lloyd*, at para. 35. The mandatory minimum attaches to any offence committed under s. 172.1(1), and these offences vary in a number of respects. They include child luring in the context of communications with a person who is, or who the accused believes is, of various ages — less than 18 years old under

s. 172.1(1)(a), less than 16 under s. 172.1(1)(b), and less than 14 under s. 172.1(1)(c). Moreover, 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.

[147] Subsection 172.1(1) also criminalizes communications sent for the purpose of facilitating a wide array of designated secondary offences. These include, among others, sexual interference with a person under 16 (s. 151), sexual exploitation (s. 153(1)), incest (s. 155), bestiality in the presence of a person under 16 (s. 160(3)), exposure of genitals to a person under 16 (s. 173(2)), aggravated sexual assault (s. 273), and abduction (ss. 280 and 281). The secondary offences vary in terms of their gravity, as evidenced by the fact that Parliament has assigned markedly different sentencing ranges to different offences within this list. For example, a conviction for aggravated sexual assault against a person under 16 carries with it a mandatory minimum of five years' imprisonment and a maximum penalty of lifetime imprisonment (s. 273(2)(a.2)). By contrast, a conviction for exposure of genitals to a person under 16 carries with it a mandatory minimum of 90 days' imprisonment and a maximum of two years' imprisonment where the Crown proceeds by way of indictment (s. 173(2)(a)) and a mandatory minimum of 30 days' imprisonment and a maximum of six months' imprisonment where the Crown proceeds summarily (s. 173(2)(b)) — these two mandatory minimums are in fact less strict than those established under s. 172.1(2). And certain designated secondary offences carry no mandatory minimum at all.

[148] As this brief overview demonstrates, there is considerable variation in terms of the conduct and circumstances that may be caught by s. 172.1(1). Yet, despite this variation, Parliament has not included a “safety valve” in the provision that would allow judges to exempt outlier cases where a significantly lower sentence might be appropriate, making the mandatory minimum provision vulnerable to constitutional challenge: see *Lloyd*, at para. 36.

[149] Moreover, the fact that child luring is a hybrid offence may present additional concerns from a s. 12 perspective. If the Crown proceeds by way of indictment, then the mandatory minimum is one year’s imprisonment (s. 172.1(2)(a)). If, however, the Crown proceeds summarily, then the mandatory minimum is six months’ imprisonment (s. 172.1(2)(b)). By creating a hybrid offence, Parliament has acknowledged that the offence can occur in circumstances where considerably lower sentences are appropriate.<sup>4</sup>

[150] Importantly, in *Nur*, a majority of this Court rejected the argument that in determining whether a mandatory minimum is grossly disproportionate, a court should take into account the prosecutor’s discretion to proceed summarily rather than by way of indictment, thereby avoiding the mandatory minimum attaching to the latter form of proceeding: see paras. 85-86 and 92. Accordingly, based on this Court’s jurisprudence, it is not open to a court to assume that the Crown will seek the higher

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<sup>4</sup> Before it was amended in July 2015, and at the time Mr. Morrison was charged, s. 172.1(2)(b) prescribed a mandatory minimum of 90 days’ imprisonment and a maximum of 18 months’ imprisonment where the Crown proceeded summarily. At that time, s. 172.1(2)(a) provided for a minimum of one year’s imprisonment and a maximum of ten years’ imprisonment if the Crown proceeded by way of indictment.

mandatory minimum only where proceeding summarily would be inappropriate in light of the gravity of the conduct alleged.

[151] From a s. 12 perspective, then, hybrid offences raise the following key concern: If we assume — as Parliament evidently did — that the sentencing floor embodied by the summary conviction mandatory minimum represents a fit sentence in at least *some* reasonably foreseeable cases, and this Court cannot rely on prosecutorial discretion to ensure that the higher mandatory minimum is invoked only where proceeding summarily would be inappropriate, then it would seem that there will necessarily be *some* reasonably foreseeable cases in which the application of the higher mandatory minimum will be disproportionate (i.e., too severe). Put differently, by identifying a sentencing floor embodied by the summary conviction minimum sentence, Parliament has openly acknowledged that there will be circumstances in which the application of the higher mandatory minimum will be harsher than necessary. Yet, following *Nur*, the court is precluded from relying on prosecutorial discretion to eliminate the risk that the higher mandatory minimum will be applied where the lower mandatory minimum ought to be applied.

[152] In the context of a hybrid offence, then, where a two-tier mandatory minimum is challenged on the basis that the higher tier is grossly disproportionate, an important question to be answered is whether the difference between the summary conviction sentencing floor (i.e., the lower mandatory minimum) and the mandatory minimum for a conviction on indictment (i.e., the higher mandatory minimum) is so

great as to render the higher mandatory minimum “grossly” disproportionate in cases where the summary conviction sentencing floor would be fit.

[153] With that in mind, certain considerations may militate in favour of a finding that the one-year mandatory minimum under s. 172.1(2)(a) does not infringe s. 12. Applying this Court’s guidance in *Lloyd*, the ultimate question is whether a sentence of one year’s imprisonment would be grossly disproportionate, having regard to the nature of the offence and the circumstances of the offender and, if need be, other persons in reasonably foreseeable situations: para. 22. It may well be that a one-year sentence for offenders in reasonably foreseeable scenarios would not be “so excessive as to outrage standards of decency” or “abhorrent or intolerable” to society and that the Crown’s decision to seek a lesser punishment by proceeding summarily — which, in a sense, might be viewed as granting the accused a form of leniency — has no impact on that conclusion: see *Lloyd*, at para. 24. Child luring is a serious offence that targets one of the most vulnerable groups within Canadian society — our children. It requires a high level of *mens rea* and involves a high degree of moral blameworthiness. And while the offence may be committed in various ways and in a broad array of circumstances — which is generally the case with most criminal offences — the simple fact remains that in order to secure a conviction, the Crown must prove beyond a reasonable doubt that the accused intentionally communicated with a person who is, or who the accused believed to be, underage, with specific intent to facilitate the commission of a sexual offence or the offence of abduction against that person. Thus, it is at least arguable that a mandatory minimum sentence

of one year's imprisonment is not grossly disproportionate in its reasonably foreseeable applications.

[154] Returning to the potential significance of the fact that s. 172.1 is a hybrid offence, I would add that this Court in *Nur* did not go so far as to state that in the context of a hybrid offence where a summary conviction carries a lesser mandatory minimum or no minimum at all, *every* mandatory minimum attaching to a conviction on indictment is necessarily grossly disproportionate and therefore contrary to s. 12. In this regard, without commenting on the merits of the decision, I note that the Alberta Court of Appeal recently upheld the constitutionality of a one-year mandatory minimum that is triggered following a conviction on indictment for sexual exploitation under s. 153(1) of the *Code*, which, like child luring, is a hybrid offence: see *R. v. EJB*, 2018 ABCA 239, 72 Alta. L.R. (6th) 29. On the other hand, and again without commenting on the merits, there is recent appellate authority going the other way: see, e.g., *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269, where the Nova Scotia Court of Appeal struck down the one-year mandatory minimums for sexual exploitation, sexual interference, and child luring, all of which are hybrid offences.

[155] A proper consideration of the constitutionality of the mandatory minimum under s. 172.1(2)(a) should take into account the various factors I have identified. Few, if any, were considered in the courts below or fully argued before this Court. As such, on the record before us and the arguments presented, in my respectful view, it would be unwise, if not inappropriate, for the Court to finally determine the s. 12 issue on this appeal.

## VII. Disposition

[156] For the above reasons, I reach the following conclusions.

[157] The Crown's appeal concerning the constitutionality of s. 172.1(3) of the *Code* is dismissed. Subsection (3) infringes s. 11(d) of the *Charter*, and that infringement cannot be saved under s. 1. It is therefore without force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

[158] Mr. Morrison's cross-appeal is allowed in part. His submissions regarding the constitutionality of s. 172.1(4) of the *Code* are dismissed. Subsection (4) does not infringe s. 7 of the *Charter*.

[159] However, in light of the trial judge's errors, I would set aside Mr. Morrison's conviction and order a new trial.

[160] Finally, I would decline to rule on whether the mandatory minimum under s. 172.1(2)(a) infringes s. 12 of the *Charter*. To that extent, I would allow the Crown's appeal and set aside the Court of Appeal's conclusion to the contrary.

The following are the reasons delivered by

KARAKATSANIS J. —

[161] I have read the reasons of my colleague Moldaver J. and concur with his analysis and conclusions regarding the proper interpretation and constitutionality of ss. 172.1(3) and (4) of the *Criminal Code*, R.S.C. 1985, c. C-46. I also agree with Moldaver J. that the conviction should be set aside and a new trial ordered.

[162] I write only with respect to the constitutionality of the mandatory minimum punishment set out in s. 172.1(2)(a). This provision requires courts to impose a minimum prison sentence of one year on every person who commits an indictable offence under s. 172.1(1). Douglas Morrison has challenged the constitutionality of this provision throughout the proceedings and, in my view, it is incumbent on this Court to address this issue. Both courts below determined that this provision is unconstitutional. If this Court declines to decide this issue and Morrison is retried and found guilty, he may be put in the unfortunate position of having to re-argue a constitutional challenge that was decided in his favour throughout these proceedings but not addressed on final appeal. Morrison — as well as other individuals convicted of a child luring offence by way of indictment — may find themselves subject to a mandatory minimum sentence that is constitutionally unsound.

[163] For the reasons that follow, I would find that the mandatory minimum sentence in s. 172.1(2)(a) violates s. 12 of the *Canadian Charter of Rights and Freedoms* and is not saved by s. 1.

A. *Determining Whether a Provision Violates Section 12 of the Charter*

[164] Section 12 of the *Charter* states that “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.” In order to qualify as “cruel and unusual” punishment, a mandatory minimum sentence must be *grossly disproportionate* (*R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at paras. 22-23; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, at pp. 1072-73).

[165] The standard of gross disproportionality is a high bar. A grossly disproportionate sentence must be more than merely excessive. It must be so excessive as to outrage our society’s standards of decency and must be disproportionate to the extent that Canadians would find it abhorrent or intolerable (*Smith*, at p. 1072; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 26; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14).

[166] To determine whether a mandatory minimum sentence imposes a grossly disproportionate punishment, the court engages in a comparative exercise. This involves comparing the mandatory minimum sentence for the relevant offence to the fit and proportionate sentence that would otherwise be mandated by the sentencing principles found in the *Criminal Code*. Ultimately, if the mandatory minimum forces courts to impose a sentence that is grossly disproportionate to the otherwise fit and proportionate sentence, then the mandatory minimum is inconsistent with s. 12 (*Lloyd*, at para. 23).

[167] This inquiry often occurs in two stages. First, the judge determines whether the mandatory minimum represents a grossly disproportionate sentence when

applied to the circumstances of the *specific offender* before the court. If so, then the mandatory minimum sentence violates s. 12 (*Smith*, at p. 1073; *Ferguson*, at paras. 13-14; *Morrisey*, at paras. 27-29 and 41; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 39).

[168] Second, even if the mandatory minimum does not violate s. 12 on the facts of the case before the court, the judge must consider whether the mandatory minimum sentence would be grossly disproportionate in other reasonably foreseeable cases. The rule of law requires certainty; no one should serve time in custody because of an unconstitutional provision (see *Nur*, at paras. 51, 63-64). The court must therefore consider whether it is reasonably foreseeable that the mandatory minimum sentence will violate s. 12 when applied to *others*. This involves evaluating the scope of the offence, the nature of the offenders and circumstances that it may capture, and the resulting range of fit and proportionate sentences. Based on this analysis, if, in a reasonably foreseeable case, imposing the mandatory minimum would result in a grossly disproportionate sentence, then the mandatory minimum violates s. 12 (*R. v. Goltz*, [1991] 3 S.C.R. 485, at pp. 505-6; *Ferguson*, at para. 30; *Nur*, at para. 51; *Lloyd*, at paras. 25-37).

[169] When assessing a mandatory minimum in the context of reasonably foreseeable cases, it will often be helpful to begin by considering previously reported cases. Past cases provide examples of the range of real-life conduct captured by the offence, as well as the characteristics of those who have been convicted (see *Nur*, at paras. 72-76). In turn, these factual scenarios help demonstrate the range of fit and

proportionate sentences for the offence. As always, judges should be guided by their common sense and judicial experience when examining the scope of an offence provision and the resulting range of proportionate sentences that it would give rise to (para. 75). Moreover, judges need not limit their inquiry to only the facts of reported cases (*Morrisey*, at para. 33).

[170] In the past, this Court has referred to “reasonable hypothetical” circumstances in which a given provision would apply in determining whether a corresponding mandatory minimum sentence would be grossly disproportionate (see *Morrisey*, at paras. 2 and 30-33; *Goltz*, at p. 515). However, as the Court recently noted, the word “hypothetical” has created confusion and often overwhelmed the analysis, leading to unhelpful debates over how general or realistic the hypothetical must be (see *Nur*, at paras. 57 and 61). Therefore, in *Lloyd*, the majority emphasized “reasonably foreseeable applications” of the law (see paras. 22 and 25).

[171] I find this shift in terminology helpful. In my view, discussing “reasonable hypotheticals” does not accurately capture the thrust of the s. 12 inquiry. Evaluating the conduct that an offence captures and the range of appropriate sentences that may arise does not involve a novel application of judicial imagination. Rather, s. 12 requires courts to consider the scope of the offence, the types of activities it penalizes and the reasonably foreseeable circumstances in which it may arise. As Chief Justice McLachlin outlined in *Nur*: “What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law’s

reasonably foreseeable impact? Courts have always asked these questions in construing the scope of offences and in determining their constitutionality” (para. 61).

B. *Does the One Year Mandatory Minimum Sentence in Section 172.1(2)(a) Violate Section 12 of the Charter?*

[172] Morrison argues that the mandatory minimum sentence in s. 172.1(2)(a) is grossly disproportionate, both in his case and in other reasonably foreseeable applications. The courts below found that Morrison should be sentenced to four months imprisonment. Therefore, they both concluded that sentencing him to the mandatory minimum prison term of one year would be grossly disproportionate (2015 ONCJ 598, 341 C.R.R. (2d) 25, at paras. 89 and 98, 2017 ONCA 582, at paras. 129-130).

[173] Given the unique circumstances of this case, it is no longer appropriate to determine whether imposing the mandatory minimum sentence on him would represent a grossly disproportionate punishment. As my colleague Moldaver J. notes, Morrison was convicted based on the trial judge’s misapprehension of how the offence in s. 172.1 operates and its requisite *mens rea* (see para. 135).

[174] Because Morrison may face a retrial, it is not prudent to determine whether those errors affected either his conviction or the fit sentence in this case. In these circumstances — given my conclusion that the mandatory minimum sentence in s. 172.1(2)(a) represents a grossly disproportionate punishment in other reasonably foreseeable applications — it is not necessary to assess the proportionality of the

mandatory minimum against the fit and proportionate sentence that would be imposed on Morrison.

[175] The constitutional law principles mandating an inquiry into the nature and scope of the law beyond one particular accused are especially relevant in this case. As the Court noted in *Nur*, “[l]ooking at whether the mandatory minimum has an unconstitutional impact on others avoids the chilling effect of unconstitutional laws remaining on the statute books” (para. 64). In this case, Morrison himself could face these chilling effects. As I have stated, he could be subjected to the mandatory minimum sentence if retried and convicted *despite* twice succeeding in his s. 12 challenge in the courts below. More broadly, the decisions below raise a spectre of unconstitutionality over s. 172.1(2)(a). No one should be subject to an unconstitutional law and “[t]esting the law against reasonably foreseeable applications will prevent people from suffering cruel and unusual punishment in the interim until the mandatory minimum is found to be unconstitutional” (para. 63). These concerns militate in favour of considering the reasonably foreseeable applications of the law even absent a convicted offender before the Court in this particular case. I now turn to the issue of reasonably foreseeable applications of s. 172.1(2)(a).

[176] Child luring is a very serious offence. It requires the accused to subjectively believe that he or she is communicating with an underage individual for the purpose of facilitating one of the offences enumerated in ss. 172.1(1)(a), (b) or (c). This section was adopted by Parliament “to identify and apprehend predatory

adults who, generally for illicit sexual purposes, troll the Internet to attract and entice vulnerable children and adolescents” (*R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3, at para. 24). It protects potential child victims by allowing the criminal law to intervene before the harm caused by the commission of the secondary offences actually occurs (*R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173, at para. 20).

[177] Given the gravity of this offence, there is no doubt that, in many cases, the appropriate sentence will be a term of imprisonment that falls within the range contemplated by s. 172.1(2)(a). For example, the Ontario Court of Appeal has determined that in most child luring cases, the sentencing goals of denunciation and deterrence require a sentence of institutional incarceration (*R. v. Jarvis* (2006), 211 C.C.C. (3d) 20 (Ont. C.A.), at paras. 27 and 31; *R. v. Folino*, 2005 ONCA 258, 77 O.R. (3d) 641, at para. 25; *Alicandro*, at para. 49; but see *R. v. Woodward*, 2011 ONCA 610, 107 O.R. (3d) 81, at para. 58). In most cases proceeding by indictment, the appropriate range will be from 12 to 24 months (*Jarvis*, at para. 31).

[178] However, this does not mean that such a sentence will be appropriate in other reasonably foreseeable cases (see *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 57-61). Nor does it mean that this mandatory minimum provision is consistent with s. 12 of the *Charter*. For the following reasons, I would find that it is not.

[179] The offence of child luring can be committed in various ways, under a broad array of circumstances and by individuals with a wide range of moral

culpability. This alone makes the provision vulnerable to constitutional challenge because such laws almost inevitably capture cases where the mandatory minimum sentence will be grossly disproportionate (see e.g. *Lloyd*, at para. 35; *Nur*, at para. 82; *Smith*, at p. 1078). Simply put, if the offence casts a wide net, this increases the likelihood of it catching individuals whose conduct will not warrant punishment remotely close to that required by the mandatory minimum sentence.

[180] The three essential elements of child luring under s. 172.1(1) are: (a) intentional communication by means of telecommunication; (b) with an individual who is — or the accused believes is — under 18, 16, or 14 years of age (depending on the sub-section at issue); (c) for the purpose of facilitating one of the enumerated secondary offences (here, invitation to sexual touching contrary to s. 152 of the *Criminal Code*) (see *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, at para. 3).

[181] The range of conduct that constitutes an offence under this section is extremely broad. As this Court stated in *Legare*, to be convicted of child luring, the accused need not commit the secondary offence on which the child luring charge is based or even intend to meet the victim. Rather, the accused need only communicate for the purpose of *facilitating* the secondary offence — helping to bring it about or making it easier or more likely to occur (paras. 25 and 28). The impugned communications need not be sexually explicit or objectively capable of facilitating the secondary offence (paras. 29 and 42). Furthermore, there is significant variation in the nature and gravity of the designated secondary offences (see Moldaver J.'s Reasons, at para. 147).

[182] As outlined above, s. 172.1(1) captures a wide variety of communications. The offence can be committed by individuals who use the Internet to target children for the purpose of physically exploiting them or, conversely, by individuals who have no intention of meeting their victims in person. Similarly, the duration of the communication may vary significantly. While, in some cases, the offender will have engaged in an extended dialogue with the victim in order to “groom” him or her, the offence can equally be made out through a short series of messages lasting only a few minutes. As my colleague points out, it can capture a single text sent by a 21-year-old adult to a 15-year-old adolescent or multiple conversations taking place over a long period between a mature adult and a 13-year-old child (Moldaver J.’s Reasons, at para. 146). Finally, the communication can actually be with an underage child or, as in this case, with a police officer posing as one (see *R. v. Rafiq*, 2015 ONCA 768, 342 O.A.C. 193, at paras. 47-49). These factors may impact the level of harm caused by the offence, thereby informing what constitutes a fit and proportionate sentence (see s. 718 of the *Criminal Code*).

[183] The personal circumstances of the offender and the relationship between the offender and the victim may also vary significantly. Past cases demonstrate that child luring offences are sometimes committed by individuals who are close in age to their victims, by those who suffer from cognitive difficulties or mental illness, and by individuals who were themselves abused in the past (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 may diminish the moral blameworthiness associated with the offence (see s. 718.1 of the *Criminal Code*).

[184] Given the variety of circumstances captured by the offence, it is not surprising that the s. 172.1(1) jurisprudence demonstrates that the fit and proportionate sentence can be significantly less than the one-year mandatory minimum term of imprisonment required by the *Criminal Code*. Courts applying the *Criminal Code*'s sentencing principles have determined that, in certain child luring cases, a fit and proportionate sanction included lesser penalties: a short period of institutional incarceration of 90 days or less (*Alicandro*, at paras. 2 and 49; *R. v. Read*, 2008 ONCJ 732 at para. 29; see also *R. v. Dehesh*, [2010] O.J. No. 2817 (S.C.J.), at para. 9; *S. (S.)*, at para. 91); a conditional sentence (*R. v. El-Jamel*, 2010 ONCA 575, 261 C.C.C. (3d) 293, at paras. 2 and 20; *R. v. Folino*, 2005 ONCA 258, 77 O.R. (3d) 641, at para. 33; *R. v. B. and S.*, 2014 BCPC 94, at para. 42 (CanLII); *R. v. Danielson*, 2013 ABPC 26, at para. 89 (CanLII)); or even a conditional discharge (*R. v. Pelletier*, 2013 QCCQ 10486 at para. 73 (CanLII)). Although some of these cases (*Dehesh*; *S. (S.)*; *Danielson*) proceeded by way of summary conviction, they demonstrate that the offence can warrant such sentences. And, as the Nova Scotia Court of Appeal recently noted, in certain reasonably foreseeable cases, a suspended sentence would be appropriate (*Hood*, at para. 154).

[185] The fact that s. 172.1(1) is a hybrid offence is also an important consideration. During the period at issue, the mandatory minimum sentence for an individual guilty of child luring on summary conviction was 90 days imprisonment, while the mandatory minimum for an individual guilty on indictment was one year

(s. 172.1(2)).<sup>5</sup> The 90-day mandatory minimum for summary conviction offences clearly demonstrates that Parliament understood that, in certain circumstances, a sentence far below that required by the one-year mandatory minimum would be appropriate.

[186] Here, the disparity between these two mandatory minimum sentences strongly suggests that s. 172.1(2)(a) violates s. 12 of the *Charter*. The fact that the provision itself indicated that a 90-day sentence — that is, a jail sentence *one quarter* the length of the mandatory minimum under s. 172.1(2)(a) — would sometimes be appropriate strongly supports the assertion that the one-year mandatory minimum is grossly disproportionate. And, as this Court has made clear, an unconstitutional mandatory minimum cannot be saved by the fact that prosecutors can elect to proceed summarily, thereby preventing the grossly disproportionate effects of the provision (*Nur*, at paras. 85-98).

[187] For these reasons, I would conclude that s. 172.1(2)(a) violates s. 12 of the *Charter*. Given the broad scope and hybrid nature of the child luring provision, it encompasses situations that can vary dramatically in the moral blameworthiness of the offender and the potential harm inflicted on the victim. An examination of the scope and potential applications of the offence, as informed by lower court jurisprudence, clearly demonstrates that short periods of imprisonment — or even conditional sentences, conditional discharges or suspended sentences — are

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<sup>5</sup> The provision was subsequently amended to change the mandatory minimum sentence on summary conviction to a term of imprisonment of six months (s. 172.1(2)).

sometimes fit and proportionate in the circumstances. Further, during the period at issue, Parliament itself contemplated that a 90-day period of incarceration would sometimes be appropriate for this offence. Sentencing someone to one year in jail when the fit and proportionate sentence would be 90 days or less is intolerable and would be shocking to Canadians. It is a cruel and unusual punishment and violates s. 12 of the *Charter*.

C. *Is this Infringement Justified Under Section 1 of the Charter?*

[188] The Crown has not argued that the mandatory minimum sentence required by s. 172.1(2)(a) is demonstrably justified in a free and democratic society. Indeed, it is difficult to imagine how a mandatory minimum sentence which is found to be grossly disproportionate because it outrages our society's standards of decency could represent a justifiable infringement under s. 1 of the *Charter* (see *Nur*, at para. 111). I would therefore conclude that the mandatory minimum sentence in s. 172.1(2)(a) is unconstitutional.

D. *Remedy*

[189] The Crown argues that instead of declaring s. 172.1(2)(a) to be of no force and effect, the Court should read into the indictable offence the mandatory minimum sentence associated with summary conviction. This, it is argued, would represent a less intrusive remedy and more closely accord with the will of Parliament.

[190] I disagree. In *Ferguson*, this Court re-iterated that the normal remedy for a mandatory sentencing provision that imposes cruel and unusual punishment contrary to s. 12 of the *Charter* is a declaration that the law is of no force and effect (para. 36).

[191] Here, there is no indication that Parliament would have passed a provision with an identical mandatory minimum sentence for both summary conviction and indictable offences had it known that the one-year mandatory minimum associated with the indictable offence under s. 172.1(2)(a) was unconstitutional. Indeed, Parliament has other options to address this type of constitutional infirmity. For example, Parliament could build judicial discretion into the provision to account for those cases where the mandatory minimum would not be constitutional. It is not the role of this Court to rewrite the provision to make it *Charter*-compliant. As in *Ferguson*, I would find that applying such a remedy in these circumstances would represent an inappropriate judicial incursion into the legislative role.

#### E. *Conclusion*

[192] For the reasons outlined above, I would not disturb the Court of Appeal's conclusion that s. 172.1(2)(a) is of no force and effect under s. 52 of the *Constitution Act, 1982*.

[193] As this Court has previously recognized, and as evidenced by this case, the wider the range of conduct to which a mandatory minimum sentence applies, the more likely that it will be found to be grossly disproportionate in certain circumstances and therefore inconsistent with s. 12 of the *Charter* (*Lloyd*, at para. 35; *Nur*, at paras. 82-83).

[194] Such constitutional defects, however, are avoidable. The harms associated with unconstitutional mandatory minimum sentences stem from their rigidity. They rob judges of the flexibility necessary to avoid imposing grossly disproportionate sentences. Building a safety valve — residual discretion — into mandatory minimum provisions would remedy this by allowing judges to make an exception in cases where the mandatory minimum would prove unconstitutional. This approach would allow legislators to send a clear and unequivocal signal that minimum sentences are presumptively appropriate, while permitting judges to depart from those guidelines in cases where the mandatory minimum would constitute excessive and unacceptable punishment.

The following are the reasons delivered by

ABELLA J. —

[195] This appeal concerns what the Crown must show to prove the offence of luring a child through telecommunication under s. 172.1 of the *Criminal Code*, R.S.C.

1985, c. C-46, and, more importantly, how an accused may defend against such a charge. I agree that the presumption of belief regarding age under s. 172.1(3) of the *Criminal Code* is a violation of s. 11(d) of the *Canadian Charter of Rights and Freedoms*. In my respectful view, however, the reasonable steps requirement in s. 172.1(4) provides a second path to conviction by importing an objective element into the *mens rea* of the offence when mistake of age is in issue. As a result, it too is unconstitutional.

[196] Although the offence is premised on the accused's belief that he or she was communicating with a child, the accused is barred from relying on his or her innocent belief where no reasonable steps were taken to ascertain the communicant's age. In the context of the Internet, this obligation to take reasonable steps may prove impossible to meet, and evidence going to "reasonable steps" may in fact ensnare the accused in the web of liability created by the offence. The result is an infringement of the right to make full answer and defence and the presumption of innocence under ss. 7 and 11(d) of the *Charter*.

[197] Internet child luring refers to the deliberate and methodical process in which a predator "aspire[s] to gain the trust of [the] targeted victims" online before attempting to "entice them into sexual activity, over the Internet or, still worse, in person" (*R. v. Legare*, [2009] 3 S.C.R. 551, at para. 2). Predators use the anonymity of the Internet to contact and interact with children in ways that would not be possible in the real world. Typically, the predatory adult will use private messaging to establish a degree of familiarity with the child before gradually sexualizing the

relationship through the use of pornography, sexual conversation online, phone conversations, and, in some cases, the arrangement of a physical encounter.

[198] The goal of criminalizing child luring is to prevent predators from using these methods to lure children into situations where they can be exploited sexually. Under s. 172.1, it is an offence to communicate by means of telecommunication with someone the accused knows or believes to be under an age specified by s. 172.1 for the purpose of facilitating the commission of a listed secondary offence with respect to that person, namely, abduction or a specified sexual offence. The three essential elements are first, an online communication; second, the accused's knowledge or belief that the communicant was under the relevant age; and third, the accused's intention to facilitate a secondary offence (*Legare*, at para. 3; *R. v. Levigne*, [2010] 2 S.C.R. 3, at para. 23).

[199] In *Legare*, Fish J. noted that attempting to classify these elements into *actus reus* and *mens rea* may prove unhelpful in reaching an appropriate verdict (para. 39). For the purpose of assessing guilt, it is enough that the three elements set out above accurately convey the prohibited conduct that constitutes the child luring offence (paras. 40-41). But in this appeal, to fully understand whether the contours of the offence are consistent with the rights guaranteed in the *Charter*, it is necessary to go further.

[200] Beginning with the conduct element, the *actus reus* of child luring will be established where the accused communicates with another person using a method of

telecommunication. This clearly implicates a wide range of legal conduct, since the vast majority of people use various means of telecommunication on a daily basis for a multitude of legitimate purposes. But the broadly defined conduct element is essential because a fundamental aspect of child luring is the predator's ability to form a relationship with the victim through ostensibly innocuous conversation about the child's home life and personal interests (*Legare*, at para. 29). Child luring is an "inchoate" or "incipient" offence which criminalizes conduct *preceding* the commission or attempted commission of a substantive sexual offence. Allowing law enforcement to intervene early and "close the cyberspace door before the predator gets in to prey" (para. 25) protects children by preventing the harms of sexual exploitation that manifest themselves when the accused has completed the substantive offence or taken actions sufficient to establish the inchoate offences of attempt or counselling (H. C. Stewart, "*Legare: Mens Rea Matters*" (2010), 70 C.R. (6th) 12, at p. 13).

[201] Online communications become criminal child luring when coupled with the requisite mental elements: the accused's *belief* that he or she is communicating with a child, and the accused's *intention* to facilitate a specified offence against that child. The further an offence is removed from the actual harms sought to be avoided, the more important the subjective component becomes in order to justify criminalization (*Legare*, at paras. 32-33, quoting A. Ashworth, *Principles of Criminal Law* (6th ed. 2009), at p. 456; Stewart (2010), at p. 15). As a result, to constitute child luring, it is essential that the communications online be done *for the purpose of facilitating* a subsequent offence and that the accused *believe* the communicant to be

a child. These elements form the *mens rea* of the offence (Stewart (2010), at pp. 16-17). As a preparatory crime, child luring captures otherwise legal conduct — communications online — where it is subjectively intended to culminate in the commission of a completed crime (*Legare*, at paras. 25 and 32).

[202] A key part of this subjective intention is the accused's belief, which is expressly identified as the sufficient fault element. This means that the Crown can prove its case based on the accused's subjective understanding that the victim was under the relevant age, regardless of whether that belief is true (Stewart (2010), at p. 16; *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at paras. 68-71). Specifying the fault element to be "belief" allows for sting operations, in which law enforcement officers pose as children to "identify and apprehend predatory adults" who "troll the Internet to attract and entice vulnerable children and adolescents" (*Levigne*, at paras. 24-25). These sting operations are crucial in the enforcement of child luring laws since, as Doherty J.A. cogently put it, "Children cannot be expected to police the Internet" (*R. v. Alicandro* (2009), 95 O.R. (3d) 173 (C.A.), at para. 38).

[203] It is clear then that the offence of child luring is almost entirely grounded in the accused's intention and belief. And although both must be established to make out the offence, belief will often be central to proving intention. This is because the exercise of inferring intention from the record of communications conducted online depends almost entirely on the context. Conversations between adults take on a different colour when one adult believes that he or she is communicating with a child. As a result, where it is shown that the accused believed the communicant was under

the specified age, communications that can be read as cultivating a relationship of trust or that are sexual in nature will almost inevitably support an intention to facilitate a secondary offence. The accused's belief that the communicant is a child often constitutes the sole difference between innocent online discourse and criminal child luring. It is for that reason that belief is the only issue in dispute for the vast majority of child luring cases.

[204] Although belief is at the centre of the child luring offence, how this element can be proven by the Crown (and defended by the accused) is affected by two additional provisions, both of which are at issue in this appeal. The first is the presumption of age under s. 172.1(3), which states:

**Presumption re age**

(3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

[205] Section 172.1(3) creates a basic fact presumption which allows the Crown to discharge its burden to prove beyond a reasonable doubt that the accused believed that he or she was communicating with a child by simply proving that the communicant was represented as being under one of the specified ages in s. 172.1. In this case, for example, "Mia Andrews", in her initial email response to Mr. Morrison, asserted that she was fourteen years old. By operation of s. 172.1(3), this assertion

would constitute proof that Mr. Morrison believed he was communicating with a person who was only fourteen years of age.

[206] The presumption is rebuttable by “evidence to the contrary”. Generally, this requires “evidence that is capable of raising a reasonable doubt as to the presumed fact” (*R. v. Gibson*, [2008] 1 S.C.R. 397, at para. 53; *R. v. Boucher*, [2005] 3 S.C.R. 499, at para. 15). However, this is further modified by the second provision at issue, s. 172.1(4), which states:

**No defence**

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

[207] In *Levigne*, Fish J. interpreted the combined effect of ss. 172.1(3) and (4). Where the accused communicates with someone who represents himself or herself as being under one of the specified ages, the accused is presumed under s. 172.1(3) to have believed that he or she was communicating with a person under that age. This presumption is rebuttable by evidence to the contrary, which, by the terms of s. 172.1(4), *must include* evidence that the accused took reasonable steps to ascertain the person’s age (*Levigne*, at para. 32). Where the presumption of belief is rebutted by evidence to the contrary, and the accused has taken reasonable steps, the trier of fact must consider whether, based on all the evidence, the accused believed the person to be under the stated age, and acquit if left with a reasonable doubt of the accused’s

guilty belief (para. 32). If no reasonable steps were taken then, all other elements being proven, the accused will be convicted.

[208] I agree, for the reasons of the majority, that the presumption of age violates s. 11(d) of the *Charter* and cannot be saved under s. 1. With respect, I do not share the view that striking down the presumption under s. 172.1(3) eliminates a second path to conviction under s. 172.1(4), whereby a conviction is available if the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain the communicant's age. What makes such a conviction possible is the interplay between the wording of the provision and the way this Court has interpreted mistake of fact. I would, as a result, find that s. 172.1(4) is also unconstitutional.

[209] The requirement to take reasonable steps under s. 172.1(4), on its face, limits the accused's ability to rely on the defence of mistake of fact. As the Court recognized in the pre-*Charter* case of *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, however, mistake of fact is not a true "defence" but rather the absence of (or, more accurately, a reasonable doubt as to) *mens rea*. In order to raise a reasonable doubt as to *mens rea*, the contours of the mistake must parallel the fault element of the offence. This means that subjective *mens rea* may be negated by an honest mistake, while objective *mens rea* may only be negated by an honest *and* reasonable mistake (D. Stuart, *Canadian Criminal Law: A Treatise* (7th ed. 2014), at pp. 311 and 317; K. Roach, *Criminal Law* (7th ed. 2018), at pp. 18-19 and 202-204; *Pappajohn*, at p. 152). Given the symbiotic relationship between *mens rea* and mistake of fact, the

*mens rea* is necessarily affected where the availability of a mistake of fact “defence” is legislatively constrained by an objective aspect which, in this case, is the requirement to take reasonable steps to ascertain age.

[210] Criminal law jurisprudence has recognized the effect of reasonable steps provisions on the fault element of an offence. Offences which include such limits have been described as “subjective-objective”, since the determination of whether an accused took “reasonable steps” to ascertain age is based on what steps a reasonable person would take in light of the circumstances known to the accused at the time (*R. v. George*, [2017] 1 S.C.R. 1021, at para. 9; *R. v. Saliba* (2013), 304 C.C.C. (3d) 133 (Ont. C.A.), at paras. 27-28; *R. v. Duran* (2013), 306 O.A.C. 301 (C.A.), at paras. 53-54; *R. v. P. (L.T.)* (1997), 113 C.C.C. (3d) 42 (B.C. C.A.), at para. 20; H.C. Stewart, *Sexual Offences in Canadian Law* (loose-leaf), at p. 4-26.2). Although the analysis depends on the information subjectively known to the accused, it remains an objective inquiry because it is assessed from the perspective of a reasonable person: the accused is “held to a standard of reasonable conduct” (*R. v. Sinclair*, 92 Alta. L.R. (5th) 64 (Q.B.), at para. 40; *R. v. Malcolm* (2000), 148 Man. R. (2d) 143 (C.A.), at para. 13; *R. v. Darrach* (1998), 38 O.R. (3d) 1 (C.A.), at pp. 24-25, *aff’d* on other grounds, [2000] 2 S.C.R. 443; *R. v. Cornejo* (2003), 68 O.R. (3d) 117 (C.A.), at paras. 19 and 30-34; *Duran*, at paras. 51-55; R. Cairns Way, “Bill C-49 and the Politics of Constitutionalized Fault” (1993), 42 *U.N.B.L.J.* 325, at pp. 329-30).

[211] We can see how the reasonable steps requirement adds objectivity to the *mens rea* by looking at how this “defence” works in practice. To raise an air of reality

for the mistake defence when there is a reasonable steps requirement, whether the mistake is one of age or consent, there must be evidence which supports both the accused's honest belief that the complainant was over the relevant age/consenting, *and* that the accused took all reasonable steps to ascertain age, or reasonable steps to ascertain consent. As a result, once mistake of fact is put in issue, the Crown can succeed by proving *either* that the accused believed the complainant to be under the relevant age/not consenting, *or* that the accused failed to take all reasonable steps to ascertain age, or reasonable steps to ascertain consent (*George*, at para. 8; Stewart (loose-leaf), at pp. 4-26.2-4-26.3; M. Manning, Q.C., and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 1113). The result is that the *mens rea* of the offence can be established solely on the accused's failure to take reasonable steps.

[212] Acknowledging that s. 172.1(4) affects the *mens rea* of the offence aligns with the interpretation of analogous limits elsewhere in the *Criminal Code*, which also inject objectivity into the fault element of the offence (with respect to mistake of age, see ss. 150.1(4) and (5) of the *Criminal Code*; *George*, at para. 8; Roach, at pp. 233-34; Stewart (loose-leaf), at pp. 4-26.2-4-26.3; with respect to mistaken belief in consent, see s. 273.2(b) of the *Criminal Code*; *Malcolm*, at para. 13; *Darrach*, at pp. 24-25; *Cornejo*, at paras. 19 and 30-34).

[213] This Court recently recognized that a reasonable steps requirement adds objectivity to the fault element of the offence in its unanimous decision in *George*, which discussed how limits on mistake of age under s. 150.1(4) of the *Criminal Code*

affect the available pathways to conviction in the context of general sexual offences.

Gascon J., writing for the Court, said:

. . . [The accused’s] only available defence — or, more accurately, her only available means of negating her criminal intent (*mens rea*) to have sex with a minor — was “mistake of age”, i.e. [the accused] believing that C.D. was at least 16. However, the *Criminal Code* limits the availability of the mistake of age defence by requiring that “all reasonable steps” be taken to ascertain the complainant’s age:

**150.1 . . .**

**Mistake of age**

(4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

At common law, “true crimes” — like those at issue here — would have a purely subjective fault element. *However, through statutory intervention, Parliament has imported an objective element into the fault analysis to enhance protections for youth. As a result, to convict an accused person who demonstrates an “air of reality” to the mistake of age defence, the Crown must prove, beyond a reasonable doubt, either that the accused person (1) did not honestly believe the complainant was at least 16 (the subjective element); or (2) did not take “all reasonable steps” to ascertain the complainant’s age (the objective element)* [Emphasis added; citations omitted; paras. 7-8.]

[214] These words are clear and unambiguous, confirming that reasonable steps requirements import objectivity into the *mens rea* of criminal offences. *George’s* discussion of reasonable steps requirements applies with equal force to s. 172.1(4). When mistake of age is in issue, s. 172.1(4) allows for a conviction if the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain age (the objective path to liability), *or* if it proves that the accused

subjectively believed that the communicant was under the relevant age (the subjective path to liability). Because statutorily defining the parameters of a permissible mistake of fact also necessarily transforms the fault element of the offence, the Crown, by proving *either* the subjective or objective path to conviction beyond a reasonable doubt, will also have established the *mens rea* beyond a reasonable doubt.

[215] I see nothing constitutionally suspect about reasonable steps requirements generally. These requirements are intended to “enhance protections for youth” in the mistake of age context (*George*, at para. 8) and preclude reliance on stereotypes and assumptions in the consent context (see *e.g.*, *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 95, per L’Heureux-Dubé J., concurring). In the unique context of Internet child luring, however, the limitations on the accused’s ability to allege mistaken belief in age in s. 172.1(4) are, in my view, inconsistent with the guarantees under ss. 7 and 11(d) of the *Charter*, which provide:

Life, liberty and security of person

**7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Proceedings in criminal and penal matters

**11.** Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[216] It is a principle of fundamental justice under s. 7 that the accused has the right to present full answer and defence to a criminal charge (*R. v. Lyttle*, [2004] 1 S.C.R. 193, at paras. 41 and 43). This depends on the accused's ability to establish a defence and challenge the case presented by the prosecution. The right to full answer and defence in turn upholds the right of the innocent not to be convicted, itself enshrined under s. 11(d) of the *Charter*. Where a provision has the effect of obstructing an accused's ability to present full answer and defence to the charge leveled against him or her, it will constitute a violation of both ss. 7 and 11(d).

[217] Under s. 172.1(4), the accused is barred from arguing that he or she did not believe that the online communicant was a child unless he or she took steps to ascertain the communicant's age that were objectively reasonable in the circumstances. In my view, any defence will be largely illusory for an accused who believed that he or she was communicating with an adult. What steps can an accused possibly take on the Internet to reasonably verify the communicant was not under the relevant age in order to escape objective liability? The effect is a nearly insurmountable barrier to the accused's ability to raise and defend his or her innocent belief.

[218] The requirement to take "reasonable steps" to ascertain age under s. 172.1(4) has been interpreted, in my view appropriately, in a way that parallels the substantially similar requirement to take "all reasonable steps" to ascertain the complainant's age under ss. 150.1(4) and (5) of the *Criminal Code* in order to rely on a mistaken belief in age defence in relation to a general sexual offence (*R. v. Thain*

(2009), 243 C.C.C. (3d) 230 (Ont. C.A.), at paras. 36-37; *R. v. Dragos* (2012), 111 O.R. (3d) 481 (C.A.), at paras. 61-62; *R. v. Pengelley* (2010), 261 C.C.C. (3d) 93 (Ont. S.C.J.), at paras. 10-11). That analysis is based on what steps a reasonable person would take in the circumstances subjectively known to the accused at the time (*George*, at para. 9; *Saliba*, at paras. 27-28; *Duran*, at paras. 53-54; *P. (L.T.)*, at para. 20). The inquiry has been described as a “highly contextual, fact-specific exercise” (*George*, at para. 9; *Stewart* (loose-leaf), at p. 4-26.3).

[219] Under ss. 150.1(4) and (5), the trier of fact must consider whether, based on the available indicia of age known to the accused, a reasonable person would accept the complainant’s age without further inquiry (*P. (L.T.)*, at paras. 20 and 27; *Duran*, at para. 52). The indicia of age include information which the accused may passively observe, such as the complainant’s physical appearance, behaviour and conduct, and other outward representations (*R. v. Osborne* (1992), 102 Nfld. & P.E.I.R. 194 (C.A.), at para. 22). Where some compelling factor exists that obviates the need for further inquiry by the accused, the reasonable steps requirement will be met. But where these factors instead call out for further inquiry, the trier of fact must go on to consider whether the accused took reasonable steps to ascertain age, or whether more was required (*R. v. Mastel* (2011), 268 C.C.C. (3d) 224 (Sask. C.A.), at para. 22). As this Court held in *George*, “the more reasonable an accused’s perception of the complainant’s age, the fewer steps reasonably required of them” (para. 9). A similar analysis applies in the context of mistaken belief in consent under s. 273.2(b) (see *Malcolm*, at paras. 21 and 24; *Darrach*, at pp. 24-25; *Cornejo*, at paras. 19 and 30-34).

[220] But it is difficult, if not impossible, to apply such an inquiry in the context of Internet child luring. Unlike the objective indicia of age that are available in an in-person encounter, such as the complainant's appearance or behaviour, the accused is required to rely exclusively on information presented over the Internet, where deception is often undetectable. Online profiles, mannerisms, and appearances are frequently artificially constructed or exaggerated. How can a reasonable person be expected to ascertain a communicant's age when he or she cannot even confirm the communicant's identity?

[221] And even if it would be reasonable for an accused to accept that the information presented online belongs to the communicant, what steps can reasonably be taken to ascertain age? Identification documents or credit card information may be sent electronically, but an individual has no means by which to verify that information. This problem is compounded when dealing with youth who lack access to such reliable documents in the first place. How does one reasonably differentiate online between a 14-year-old and a 45-year-old, let alone between a 15, 16, or 17-year-old? The anonymous and unverifiable nature of online identities is, as the Crown acknowledges, the *very reason* that the offence is based on what the accused believed at the time of the communication, and not on whether that belief was correct.

[222] Moreover, additional communications made in an effort to ascertain age will necessarily put the accused at a heightened risk of being inculpated in the very offence intended to be avoided. Conversations about family, school, and activities designed to assess whether the communicant is of sufficient age are among the same

techniques used by predators to identify and groom young people online (see *Legare*, at para. 29; *R. v. Adams* (2017), 45 Alta. L.R. (6th) 171 (Q.B), at para. 90). Similarly, the accused's request for a photo or video is often associated with child luring (*Legare*, at paras. 10-11; Trial Decision, at para. 35; *Pengelly*, at para. 54; *R. v. Bayat* (2011), 108 O.R. (3d) 420 (C.A.), at para. 20; *R. v. Froese*, 2015 ONSC 1075, at para. 74 (CanLII)).

[223] The inherent similarity between evidence going to “reasonable steps” and evidence of child luring in the Internet context may make it impossible for an accused to escape objective liability, despite holding an honest belief that the communicant was over the specified age. This is so because attempts to ascertain age may be seen by the trier of fact as evidence that the accused believed that the communicant was a child. The result of the reasonable steps requirement in s. 172.1(4), therefore, is to render illusory the accused's ability to allege an honest but mistaken belief in age. This, in my view, constitutes an interference with the accused's fundamental right to make full answer and defence under s. 7 and the presumption of innocence under s. 11(d).

[224] As Fish J. made clear in *Legare*, what matters is “whether *the evidence as a whole* establishes beyond a reasonable doubt that the accused communicated by computer with an underage victim for the purpose of facilitating the commission of a specified secondary offence with respect to that victim” (para. 42 (emphasis in original)). The Crown must prove each element of the offence beyond a reasonable doubt, including belief, and the accused must have a full and fair opportunity to

defend against the charge, whether by arguing that the Crown has failed to meet its burden, or by adducing positive evidence supporting his or her innocence. Any other state of affairs will violate the *Charter*.

[225] Nor do I think that s. 172.1(4) can be saved under s. 1 of the *Charter*, largely for the reasons provided by the majority in relation to s. 172.1(3). I agree that preventing the accused from advancing mistake of age arguments in the absence of an objective basis is rationally connected to the pressing and substantial objective as defined in *Levigne*, namely “to foreclose exculpatory claims of ignorance or mistake that are entirely devoid of an objective evidentiary basis” (para. 31). But in my view the harmful effects of the provision outweigh its salutary effects. The reasonable steps requirement under s. 172.1(4) significantly harms the right to make full answer and defence and the presumption of innocence, rights fundamental to our criminal justice system, and erodes these rights in a manner that risks convicting the innocent. The seriousness of this harm outweighs any salutary impact. Section 172.1(4) is, as a result, unconstitutional.

[226] I would therefore set aside Mr. Morrison’s conviction and order an acquittal.

[227] Finally, I agree with Justice Karakatsanis that the mandatory minimum sentence in s. 172.1(2)(a) violates s. 12 of the *Charter*.

*Appeal and cross-appeal allowed in part, ABELLA J. dissenting in part.*

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