Court of Queen's Bench of Alberta

Citation: R v Reeves, 2020 ABQB 78

Date: 20200130
Docket: 180299414Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Nathan Gregory Reeves

Accused (Applicant)

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the victim or complainant must not be published, broadcast, or transmitted in any way.

NOTE: This judgment is intended to comply with the identification ban.

Reasons for Decision
of the
Honourable Mr. Justice T.D. Clackson

I. Summary

[1] The mandatory minimum sentence ("mms") provided for in s. 172.1(2)(a) of the *Criminal Code* is constitutional. The mms provided for in s. 152(a) is unconstitutional as contrary to s. 12 of the *Charter of Rights and Freedoms* (*"Charter*). The mms in s. 151(a), was previously found to be unconstitutional by the Alberta Court of Appeal in the ***R v Ford*** [2019] A.J. No. 277.

II. Circumstances

[2] Nathan Gregory Reeves was convicted by a jury of the following three offences:

1. Communicating by means of telecommunication with a person he believed to be under 16 years for the purpose of facilitating the commission of an offence under s. 151, 152, 160(3), 173(2), 271, 272, 273 or 280 with respect to that person. This offence is commonly referred to as "luring". It is an offence contrary to s. 172.1(1)(b) of the *Criminal Code*;
2. Inciting, inviting or counselling a person under 16 years to touch his body with of her body for a sexual person. This offence is commonly referred to as "invitation to sexual touching". It is an offence contrary to s. 152 of the *Criminal Code*;
3. Touching a person under 16 years for a sexual purpose. This offence is commonly referred to as "sexual interference". It is an offence contrary to s. 151 of the *Criminal Code*.

[3] As the trial judge, s. 724(4) of the *Criminal Code* requires me to determine the facts for the purpose of determining a fit and proper sentence to impose upon Mr. Reeves, for his crimes.

[4] In its brief, the Crown detailed the relevant facts which it believes essential to the jury's verdict and/or proved by the evidence heard at trial. As Mr. Reeves did not take any real issue with the Crown's summary, I reproduce here what was provided to me. I accept what follows as fact.

1. As to Counts #1 and #2:

    a. At all times relevant to these offences the complainant, K, was 15 years old.

    b. The accused was known to the complainant, K and to her parents, D and G. The parents had known the accused for seven to eight years. G would see the accused two to three times a week. The common connections between K's family and the accused were the ringette community as well as the local skate park (when K's family moved into the neighbourhood in 2017). K testified that she could tell her problems to the accused and therefore confided in him.

    c. As the accused had two children of his own, K's parents were not concerned by their daughter K going to the Reeve's residence. The accused and K communicated with one another regularly by text messaging and other social media applications. K's parents were not aware of this until K's mother saw a snapchat message between the accused and K on August 23, 2017.

    d. On August 22, 2017, K requested that the accused obtain alcohol for her and her friend and that they meet at the skate park. The accused obtained Malibu Rum for this purpose from a liquor store. The Jury was provided with video surveillance evidence, a Liquor Depot receipt for the purchase of the rum, and *viva voce* evidence from a Liquor Depot employee about the store only making one sale of Malibu Rum that day. The accused asked K for a photograph of her and her friend kissing which she refused.

    e. Phone records show calls to the accused's cellphone from K around the time of the purchase of the rum. Mr. Ozero gave forensic evidence regarding the ownership

and control of the cell phone that was seized from the accused. It had had Snapchat installed but it had been removed on August 23, 2017. Screenshots of Snapchat communications between K and the accused were entered as Exhibits. There were 41 text messages retrieved between K's phone and the phone seized from the accused.

f. The accused met both girls at the skate park and then drove them to the "cliff area." Once there, he poured alcoholic drinks for the girls in mugs that he had in his car. The accused points out that the evidence on this subject is not clear but concedes that the accused made the alcohol available to the girls.

g. At the cliff area he offered to let K drive his car in return for a kiss. She refused.

h. The accused drove the girls home. He gave K a hug and picked her up off the ground. He then sent her this message "tonight all I wanted to do was hug and kiss you not thinking of a guy." This message was captured by a screen shot performed by K's mother at 1:43 am on August 23, 2017.

i. From its verdict, the Jury must have found beyond a reasonable doubt that not only did the electronic communications occur between the accused and K but must have been communicated by the accused for the purpose of facilitating the commission of a sexual offence. In this context, the offences being facilitated would have been sexual interference and an invitation to sexual touching.

2. As to Count #3:

a. At all relevant times, A, was 15 years of age. She was the other person with K at the park.

b. Once the accused picked the girls up from the skate park en route to the cliff area he placed his hand on A's knee and held it there while telling her that she was very pretty.

c. A described that this made her feel uncomfortable

d. After providing the alcohol to the girls at the cliff area, the accused tried to hug A whereupon K told him "don't."

e. On the drive home, the accused put his hands on A's shoulder and neck and rubbed down her back, near her bra strap. Again, the evidence on this subject is not totally clear. I accept that the reference by A to the rubbing being near her bra strap could have meant the shoulder strap part of the bra.

f. By its verdict, the Jury must have found that not only did these physical actions occur but that the accused had a sexual purpose in touching A.

[5] Each of the three offences compel the imposition of a minimum sentence. Mr. Reeves challenges the constitutionality of the mandated minimums. He seeks to have me declare that the mandatory minimum sentence ("mms") contained within each section is contrary to s. 12 of the *Charter*. He further seeks to have me declare that, in each case, the constitutional invalidity cannot be saved by s. 1 of the *Charter*. In result, he seeks to have me impose a sentence upon him in accordance with the usual principles of sentencing, without regard to any mms.

III. Analysis

[6] I will first deal with the arguments regarding constitutionality relative to each offence. I will then move to determine a fit and proper sentence for each count.

A. Constitutionality

[7] The Crown offered no argument nor evidence to justify concluding that an unconstitutional mms is salvageable by s. 1 of the *Charter*. Indeed, as the Alberta Court of Appeal noted in ***R v Ford (supra)***, it would be very difficult to show that a grossly disproportionate sentence, the result of a mms, could be justified under s. 1. Therefore, my analysis will proceed on the basis that if any of the three impugned provisions are determined to be contrary to s. 12, that provision will be struck down.

1. Section 151(Count #3)

[8] I begin with the constitutionality of s. 151, sexual interference, which was Count #3 on the Indictment.

[9] The Crown concedes that the Alberta Court of Appeal in ***Ford*** determined the constitutionality of the mms in s. 151 and agrees that decision is binding upon me. Therefore, the Crown concedes that in sentencing Mr. Reeves on Count #3, I must do so without regard to the mms contained within s. 151(a).

2. Section 152 (Count #2)

[10] In ***Ford***, P. Martin, J.A. offered this at paragraphs 9 and 10. (I have edited out the segments which are not specifically germane to my analysis.)

> 9 The Supreme Court considered whether mandatory minimum sentences offended s 12 of the *Charter* only occasionally prior to 2015: *R v Smith*, [1987] 1 SCR 1045; *R v Goltz*, [1991] 3 SCR 485; *R v Morrisey*, 2000 SCC 39; and *R v Ferguson*, 2008 SCC 6. These cases generally concluded that mandatory minimum sentences would only rarely offend s 12.
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> 10 That changed with the release of *R v Nur*, 2015 SCC 15 and *R v Lloyd*, 2016 SCC 13. These decisions offered a more comprehensive analysis of the tension between mandatory minimum sentences and s 12 of the *Charter*. The following general principles can be drawn from *Nur* and *Lloyd* when considering whether a mandatory minimum sentence is s 12 compliant:
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> * A sentence is "cruel and unusual punishment" under s 12 of the *Charter* if it is grossly disproportionate to the sentence that is appropriate given the nature of the offence and the circumstances of the offender (*Nur* at para 39). This is a high bar - a sentence that is "merely excessive" is not cruel and unusual, but must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society (*Lloyd* at para 24).
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> * Deciding a challenge to a mandatory minimum sentencing provision involves a two-step analysis (*Nur* at para 46; *Lloyd* at para 23). The court must perform this analysis both for the actual offender before the court and for reasonably foreseeable hypothetical offenders (*Nur* at para 77; *Lloyd* at para 22):

> 1. The court must assess what is a proportionate sentence for the offence, absent the minimum. The court need not fix the sentence or range at a specific point, especially for hypothetical offenders, but the court should consider the rough scale of the appropriate sentence (*Lloyd* at para 23).
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> 2. Having done so, the court must ask whether the mandatory minimum will require the imposition of a grossly disproportionate sentence (*Lloyd* at para 23).
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> * Crown discretion to proceed summarily or decline to charge at all cannot save a minimum penalty that mandates a cruel and unusual punishment (*Nur* at paras 85-88; *Smith* at para 5). The possibility of liability, combined with the certainty that the minimum sentence would be imposed on conviction, is sufficient to find a breach of s 12 (*Smith* at para 5). Sentencing is a judicial function and the duty to impose a constitutional sentence cannot be delegated to the Crown, particularly given the effectively unreviewable nature of Crown discretion (*Nur* at paras 85-88).
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> . . .
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> * An offender may argue that a minimum sentence violates s 12 even if there is previous binding authority to the contrary, on two potential bases. First, it is always open to an offender to argue that the minimum penalty is grossly disproportionate as applied to them personally. Second, the offender may raise reasonable hypothetical that were not before the previous court.
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> * Mandatory minimum provisions that apply to offences that can be committed in various ways, under a broad range of circumstances and by a wide range of people are constitutionally vulnerable, as such provisions will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional (*Lloyd* at paras 3, 35). Possible solutions to this vulnerability include narrowing the conditions of application of the mandatory minimum so that it only catches offenders who deserve the mandatory minimum sentence or more, or building in a "safety valve" legislatively that would give judges discretion to exempt persons for whom the mandatory minimum would violate s 12 (*Lloyd* at para 36).

[11] Justice Martin's helpful summary does not strictly specify whether one considers a hypothetical before the particular circumstances of the accused and his offence. However, the authorities do invariably proceed in that fashion. That in mind, I find it more convenient and efficient to consider the reasonable hypotheticals first. I do so because it is my opinion that the court's analysis of the hypotheticals presented to it in ***Ford*** compels the conclusion that the mms in s. 152 offends s. 12.

[12] In ***Ford***, the court concluded that in the specific circumstances of the offence and the accused before it, imprisonment of the accused for one year was not grossly disproportionate. Justice Martin then went on to consider reasonable hypotheticals. At paragraphs 13 and 14, he offered this:

> 13 From the foregoing it appears that reasonable hypotheticals will be sufficient if they attract prosecution under the impugned provision without reflecting all of the aggravating

features of the case at bar. I turn now to consider such scenarios. To better illustrate the grossly disproportionate nature of the mandatory minimum sentence in question, I will rely only on the circumstances of the offence and refrain from relying on any of the hypothetical offender's personal characteristics, which only makes the exercise easier. See *R v Scofield,* 2019 BCCA 3. Also, each scenario will reflect the specific intent required by s 151; that is, an intentional touching for a sexual purpose.

14 I begin with a sanitized version of the case at bar and consider a 20-year-old who meets a 13-year-old and after spending several hours together, they kiss with a view to eventually engaging in sexual intercourse. While still "just kissing", they are interrupted by a passing police officer. I pause to observe that without more, a kiss is sufficient to attract criminal liability if the court is satisfied the nature of the kissing has a sexual purpose: *R v Menjivar*, 2010 ABPC 164.

[13] At paragraph 17, Martin JA expressed his conclusion in these words:

17 These hypotheticals are reasonable, foreseeable and realistic, and some are versions of actual cases. In my opinion, in the absence of a mandatory minimum provision, all would call for a sentence ranging from a suspended sentence to a conditional sentence, or at the most, a custodial sentence measured in days, not months. Accordingly, all demonstrate that the mandatory minimum sentence of one year imprisonment required to be imposed upon conviction of an offence under s 151(a) is grossly disproportionate as that term has been defined in *Nur* and *Lloyd*. As noted in *Nur* at paras 85-88, Crown discretion to proceed by summary conviction or to decline to charge cannot save a minimum sentence that mandates cruel and unusual punishment.

18 I conclude that the mandatory minimum sentence prescribed by s 151(a) of the *Criminal Code* is unconstitutional and of no force or effect. In my opinion that sentence would be constitutional if the offence required sexual intercourse or oral sex or activity of that kind to sustain a conviction and the court could ignore the personal characteristics of the offender. But s 151 is not predicated on such conduct; it requires only a "touch" for a sexual purpose. My conclusion comports with the recent decisions of other appellate courts: *R v Hood*, 2018 NSCA 18, *R v JED* 2018 MBCA 123, and *Scofield*.

19 A final observation. I am aware that this decision is at odds with *R v EJB*, 2018 ABCA 239, which considered the constitutionality of the mandatory minimum sentence prescribed by s 153 of the *Criminal Code*. This creates an unusual situation but the decisions address different provisions of the *Criminal Code* such that the parties were not obliged to request reconsideration of *EJB*. Also, I note that *EJB* is currently before the Supreme Court on application for leave to appeal. Finally, the court in *Nur*, while stressing that the threshold for revisiting the constitutionality of a mandatory minimum sentence is high, observed:

> ...*stare decisis* does not prevent a court from looking at different circumstances and new evidence that was not considered in the preceding case. A court's conclusion based on its review of the provision's reasonably foreseeable applications does not foreclose consideration in future of different reasonable applications, (para 71)

[14] In my view, that reasoning is directly applicable to Count #2. The offence of invitation to sexual touching was proved when the jury accepted that the accused asked for a kiss from K. That was the essential factual conclusion that had to be drawn to support the conviction. The similarity between that finding and hypothetical postulated by Justice Martin is obvious. While I recognize that Chief Justice Fraser in ***R v Hajar*** [2016] A.J. No. 754 (CA) cautioned against reliance on sentencing decisions of that court, the panel of the court in ***Ford*** consisted of Justices Martin, Greckol and Khullar. All are highly respected, thoughtful and experienced. Their opinions are, in my view, entitled to a great deal of weight. No doubt, at least in part, that is why the Crown did not seek to revisit the court's decisions in ***Ford***.

[15] It follows that the mms compelled by s. 152(a) is unconstitutional. Therefore, in sentencing Mr. Reeves on this Count, I must do so without regard to the mms contained in s. 152(a).

3. Section 172.1(1)(b) (Count #1)

A. <u>Hypotheticals</u>

[16] Again, my analysis commences with the consideration of the constitutionality of the mms in respect to reasonable hypotheticals. While there is no decision binding upon me on this subject, there are four decisions which directly bear upon the issue: ***Hajar (supra)***, ***R v Cowell*** [2019] ONCA 972, ***R v Woodward*** [2011] ONCA 610 and ***R v Morrison*** [2019] SCC 15.

[17] In ***Woodward***, the accused appealed his sentence of 6.5 years for offences which included 5 years for sexual assault and 1.5 years consecutive for luring. The 30-year-old accused used cell phone messaging to eventually groom the 12-year-old victim into agreeing to intercourse for money. On the subject of the luring offence, Justice Moldaver (now a member of the Supreme Court of Canada) speaking for himself and Justices Cronk and Epstein, said this at paragraphs 54 to 59.

> 54 With the exception of this court's decision in *Jarvis* ((2006), 211 C.C.C. (3d) 20 Ont. C.A.), I do not propose to detail the facts and circumstances of the other cases cited. *Jarvis* is worth mentioning because it has been interpreted as holding that the appropriate range of sentence for the offence of luring is 12 months to two years. That stems from a comment found at para. 31 of the decision, where Rosenberg J.A., for the court, made the observation that the "decisions of trial courts that were placed before us suggest that the range of sentence for this offence [luring] generally lies between twelve months and two years."
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> 55 The facts of *Jarvis* may be stated briefly. Jarvis pleaded guilty to luring a child over the internet. He was a 22-year-old first offender. He had seven communications with an undercover officer whom he believed to be a 13-year-old girl. In the course of his communications with the officer, he engaged in sexually explicit discussions and forwarded two photographs of his penis to the undercover officer. Jarvis pressed the undercover officer to meet in person and the officer agreed to do so. Jarvis was arrested when he arrived at the designated meeting point. He was not wearing underwear and he had brought a condom.
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> 56 At trial, Jarvis entered a plea of guilty to the charge of luring a child he believed to be under the age of 14, contrary to s. 172.1(1)(c) (as it then read). He received a sentence

> of six months' imprisonment and three years' probation. Both he and the Crown appealed that sentence and this court dismissed the appeals.
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> 57 Two comments about *Jarvis* are in order. First, I am not at all persuaded that Rosenberg J.A. was purporting to set the range of sentence for the offence of luring at 12 months to two years. Rosenberg J.A.'s reasons do not focus on the range of sentence for the offence of luring. Rather, they are concerned primarily with a discussion about certain evidence that the Crown sought to introduce at trial and additional evidence that it proposed to introduce as fresh evidence on appeal primarily for the purpose of establishing that children frequently use the internet and are vulnerable to being exposed to sexual content and sexual invitations. The evidence in dispute involved information obtained from a survey of children, 99% of whom reported that they used the internet to some extent. Many of the children surveyed reported that in their internet use they had received pornography on numerous occasions, had been exposed to unwanted sexual comments, and had been asked to meet in person the individual with whom they were chatting. None of the impugned evidence was admitted on appeal.
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> 58 Even if *Jarvis* did purport to set a range of 12 to 24 months for the offence of luring, that range needs to be revised given the 2007 amendment in which Parliament doubled the maximum punishment from 5 years to 10 years. Moreover, if it is shown through the introduction of properly-tendered evidence that the offence of luring has become a pervasive social problem, I believe that much stiffer sentences, in the range of three to five years, might well be warranted to deter, denounce and separate from society adult predators who would commit this insidious crime.
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> 59 One need only consider the facts of this case to appreciate the dangers and disturbing features of the crime of luring and the grave consequences that may flow from it - here, a face-to-face meeting between a 30-year-old predator and a 12-year-old child, resulting in the sexual assault of the child. Fortunately, the appellant did not inflict further harm on the complainant after the sexual assault. That, perhaps, is the one positive thing that can be said about him. But the offence of luring carries very real dangers - innocent children being seduced and sexually assaulted or even worse, kidnapped, sexually abused and possibly killed.

[18] While there is no evidence before me that deals with children's use of the internet, the content they are exposed to, or the frequency of sexual comment in their contacts, I can and do accept Justice Moldaver's comments in paragraphs 58 and 59 as punctuating the very real dangers that the crime of luring creates and society's abhorrence of the predatory conduct which is the feature of this crime.

[19] In ***Hajar***, although, again, paragraph 150 of that decision suggests I may not be bound by the decision, the court had a good deal to say on the subject of s. 172.1. Given that the panel in ***Hajar*** consisted of five members of the court, all of whom, although in separate reasons, agreed on the sentence that Hajar should have received for luring his victim contrary to s. 172.1, I am confident that the opinions expressed on the treatment of offenders guilty of luring should be treated as very persuasive. As well, there was some evidence led on the subjects which had troubled Justice Moldaver in ***Woodward***. In any event, I am of the view that I can take judicial notice or adopt what my colleagues have said as establishing the harm suffered by child victims,

their vulnerability, the insidious nature of electronic communications and the compulsive nature of a child's consumption of electronic media, particularly social media.

[20] Returning to ***Hajar***, I begin with the reasons of the majority as written by Chief Justice Fraser. Commencing at paragraph 64 through 70, Fraser CJ summarized the considerations which are the foundation for society's abhorrence of the sexual victimization of children.

> 64 Dr. Boyes' evidence may be summed up this way. For children under 16 who engage in sexual relations with older partners, there is a foreseeable and significantly increased risk of profound short- and long-term negative developmental and psycho-social outcomes even where the children gave their *de facto* consent, including in the context of a "relationship" with an older "partner". In the Reasons at paras 40-41, the sentencing judge accepted Dr. Boyes' evidence about the likelihood of harm:
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> > ... In speaking of the negative developmental consequences of sexual activity in childhood or being forced into non-consensual sexual acts during adolescence, Dr. Boyes comments that these activities "increase the likelihood, in both the developmental short and longer terms, of lowered self-esteem, depression, suicidal ideation, poor school performance or lower levels of educational attainment or school completion and significant negative impact upon current and future social relationships and intimate relationships".
> >
> > Dr. Boyes suggests that in addition to these negative consequences, the early onset of sexual activity and involvement in sexual activities with an older partner "are both associated with significantly increased risk or odds of negative consequences or problematic developmental outcomes"...
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> 65 Dr. Boyes' evidence on harm to children is fundamental to understanding the seriousness of this crime. It stands in testament to the likelihood of often multiple cascading and destructive consequences even where a child has given *de facto* consent in a "relationship" with an older partner. This harm may be even more serious than the violation of the child's physical integrity but less obvious, indeed even unascertainable, at sentencing. At this stage, the child may not recognize, much less accept, the extent of any existing harm or the likelihood of harm in the future. Nevertheless, in sentencing for major sexual interference, the sentencing judge must take into account the likelihood of serious psychological or emotional harm to the child victim irrespective of the child's *de facto* consent.
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> 66 Even without expert evidence, courts have recognized the harm to children from abusive interference: see, for example, *R v Hewlett*, 2002 ABCA 179, 167 CCC (3d) 425; *R v D(D)* (2002), 58 OR (3d) 788 (CA), 163 CCC (3d) 471 [D(D)]; AB; *R v Woodward*, 2011 ONCA 610, 107 OR (3d) 81 [*Woodward*]. In *Woodward, supra* at para 72, the Ontario Court of Appeal confirmed a number of consequences of child sexual abuse:
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> > Three such consequences are now well-recognized: (i) children often suffer immediate physical and psychological harm; (ii) children who have been sexually abused may never be able, as an adult, to form a loving, caring relationship with another adult; (iii) and children who have been sexually abused are prone to become abusers themselves when they reach adulthood...

> 67 There is another aspect of the harm caused by an offender who commits an act of major sexual interference. That is the harm caused to society, including both the broader community and the child's family. The criminal law operates to protect the vulnerable not just by punishing those who subject the vulnerable to risk of harm, but by reinforcing the message that we condemn the attitude which promotes such conduct. Nor is there any room in our diverse and tolerant society for so-called cultural distinctions either. Devaluation of any members of society is an evil in itself, as well as criminal. It is not just that child victims suffer from these crimes, although plainly that is enough to justify the effort to protect children. Society as a whole is diminished and degraded.
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> 68 Moreover, it is society that bears a substantial portion of the consequences flowing from the social problems that premature sexual activity between a child and an adult offender often produce. And it is society that must typically pick up the pieces when child abuse in one generation leads to ramifications over generations. The harm inherent in the crime of sexual interference extends well beyond the one child victim. Harm to any child in the community affects the rights and security of everyone because perpetrators of crimes against children strike a blow directly at one of the core values in our society -- protection of children.
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> 69 As the sentencing judge here well understood, sex offenders come in many shapes. Sexual interference is perpetrated not only by an older sexual predator on the Internet. The image this evokes is of a 40-year-old man who meets a 14-year-old child on the Internet, lures her to a motel, and then engages in so-called "consensual" sex with her. Yet as many child victims in this country, young women and men alike, have learned to their endless and painful regret and that of their families, this is not the only way sex offenders come calling. The offender luring the child out of the safety of her home and away from the protection of her family may only be 20, not 40, well-groomed, well-spoken and well-able to convince the child to do whatever he wants. An offender may perhaps even be known to the child victim. But if we fail to recognize this act of major sexual interference for what it is, child sexual abuse, and worse yet, discount its true gravity, this may be seen as enabling, if not excusing, this similarly destructive behaviour. That approach would cheat young girls and boys out of the protection Parliament intended.
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> 70 Courts may not be able to stop those intent on abusing children. But given the scope of harm caused by crimes involving child sexual abuse, those determined to commit them should know that, as stated in *D(D), supra* at para 45:"... prey upon innocent children and you will pay a heavy price!"

[21] Then dealing specifically with luring, the majority offered this at paragraphs 154 to 159, and paragraphs 166 and 167:

> 154 The Reasons correctly found that Hajar's luring of a child by using the dragnet of the Internet to draw her into his scheme was a separate offence. And it deserved a consecutive sentence. However, the Reasons erred in treating luring as an aggravating factor for sexual interference rather than addressing a fit sentence for this offence in its own right. As a consequence, the Reasons incorrectly diminished not only the gravity of the sexual interference offence but also the luring offence. The Reasons used the luring as an aggravating factor in sentencing for sexual interference. But the sentence imposed for

sexual interference demonstrates the luring offence was not properly accounted for in that sentence. And then, having stated that luring was used to aggravate sentence for sexual interference, which did not occur, the Reasons then imposed a sentence for luring well below any acceptable range. This constitutes further error.

155 Luring of a child is a serious offence because the Internet provides those intent on abusing children with access to them that would almost certainly be blocked in their own homes: *R v Legare*, 2009 SCC 56 at para 26, [2009] 3 SCR 551. Hajar's use of the Internet required planning and deliberation. The ease with which this offence can be committed and its prevalence and long reach are all factors which speak to the need for this Court to strongly discourage and denounce this modern criminality: see *R v Paradee*, 2013 ABCA 41 at para 12, 542 AR 222 [*Paradee*]. This offence too falls within the scope of s 718.01 of the Code which requires that, in sentencing, primary consideration be given to the objectives of denunciation and deterrence.

156 A highly aggravating factor in this case is that Hajar also used the Internet to encourage the child to make pornography and share it with him. This can create an enduring electronic data trail which may persist to harass the child victim for years. The potential use and further abuse of such images would have served to continue the child's victimization. The Reasons recognized that Hajar's specific conduct involved the potential for such images to be shared with others, thus increasing the risk for harm and potentially furthering Hajar's ability to make the child more sexually compliant. But in the result, the sentence imposed, three months consecutive to the 15 months for sexual interference, is well outside any reasonable range for commission of this offence. Simply put, it demonstrates that inadequate consideration was given to the gravity of this offence and the mandatory objectives of denunciation and deterrence.

157 The courts may not be able to close the cyberspace door. But an attempt must be made to discourage predators from even opening it towards children: *R v KRJ*, 2016 SCC 31. A three-month sentence for the offence of luring a child on the facts of this case is demonstrably unfit.

b. Improper Application of Totality Principle

158 The Reasons also erred in principle in concluding that the concept of totality justified a reduction in the sentence for luring of a child. There is no indication of what a fit notional sentence would be for that Internet luring before application of totality. It appears as well that the Reasons may also have blended common law totality and statutory totality: see Reasons at para 73. This Court has explained the two different versions of totality recognized in Canadian law (and their somewhat different relationships to the principles of proportionality and restraint) in recent cases: see, for example, *R v May*, 2012 ABCA 213 at paras 7-15, 533 AR 182; *R v Ranger*, 2014 ABCA 50 at paras 49-50, 569 AR 39.

159 There is no justification for applying totality to dial down Hajar's sentence for luring. Hajar's use of the Internet to facilitate his location of the child and thereafter insinuate himself into a bogus relationship with her is a serious crime in its own right. The sentencing judge put it best. This amounted to a virtual home invasion. Hajar's use of this tool to create the opportunity for him to commit a sex crime with the child victim

> here reflects not merely planning and deliberation on his part but also his decision to use a method deliberately designed to avoid parental detection.
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> 166 In *Paradee*, *supra* at para 25, this Court adopted the view that a range had been emerging for the luring of a child of one to three years, citing *R v Hepburn*, 2010 ABCA 157, 487 AR 222 and other authorities. It replaced a conditional sentence order with imprisonment for 12 months. Parliament has now prescribed a minimum one year sentence for this offence. There was no minimum sentence for this offence when it was committed by Hajar. As noted, a highly aggravating factor is Hajar's convincing the child to make pornography and share it with him. With all this in mind and in light of Hajar's guilty plea, a fit sentence for this offence would be one year imprisonment.
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> 167 We caution that this should not be taken to be a sentence appropriate to future cases, where one year is now the minimum sentence specified by Parliament, especially given the aggravating feature here. This Court is well aware of the dangers posed by Internet luring in Canada and the pervasiveness of this problem. Therefore, sterner sentences in the range of two to four years might well be justified in order to deter and denounce adult sexual offenders who view children as easy prey.

[22] Slater, J.A. dissented, but on the topic of luring he appears to have been *ad idem* with the majority. He offered this as paragraphs 279 to 286:

> 279 The offence of internet luring is regarded as a serious gateway offence. Virtually all young people have access to the internet, and it is increasingly the communication mode of choice. The universality and anonymity of the internet permits criminals and others with improper motives to inappropriately access vulnerable segments of the community in ways that are difficult to intercept or detect: *R. v K.R.J.*, 2016 SCC 31 at para. 113.
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> 280 These factors were all helpfully summarized in *R. v Paradee*, 2013 ABCA 41 at para. 12, 85 Alta LR (5th) 177, 542 AR 222:
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> > 12 Luring is dangerous and, as the Crown points out, serious. It involves pre-meditated conduct specifically designed to engage an underage person in a relationship with the offender, with the goal of reducing the inhibitions of the young person so that he or she will be prepared to engage in further conduct that is not only criminal but extremely harmful. Parliament has recognized that the internet has infinitely expanded the opportunity for predators to attract or ensnare children. The anonymity of the internet allows the predator to hide his or her true identity, to mask predatory behaviours through seemingly innocuous but persistent communication, and to count on the victims letting their guard down because the communication occurs in the privacy and supposed safety of their own homes. A proportionate sentence for internet luring must recognize the serious nature of this offence.
>
> *Paradee* noted some additional aggravating factors in that case, for example that the accused had misrepresented himself in his internet profile. The Court found that a conditional sentence did not properly denounce the offence and deter others, and suggested at para. 25 that the range of sentencing in similar cases was between 12 months

and three years. It substituted a sentence of 12 months incarceration, in part because that was the sentence requested by the Crown.

281 The sentencing judge (Justice Macklin) in this case recognized that these factors were at play:

> 17 The use of the internet to lure the victim amounts to a virtual home invasion. Mr. Hajar was able to creep into the victim's bedroom without having to physically enter her house or confront her parents. While he has accused the parents of a lack of parental supervision, his use of internet technology and online messaging practices were specifically designed to evade any parental oversight that might naturally have occurred had Mr. Hajar walked up to, and knocked on, the front door of the victim's house.

Ironically, it was the respondent who pointed out the dangerousness of internet luring. During preparation of the pre-sentence report, he suggested that the complainant's parents were partly to blame because they were not properly supervising her. However, because the internet allows a perpetrator like the respondent to bypass the normal methods of parental control, it makes internet luring an even more dangerous activity.

282 The respondent's guilty plea was a mitigating factor. However, his minimization of his responsibility for the internet luring was an aggravating factor, as was his attempt to blame the complainant and her parents. Although the sentencing judge found that he was unlikely to reoffend, general deterrence is an important factor in sentencing for internet luring.

283 A further aggravating factor here was that the respondent enticed the complainant to transmit pornographic photographs of herself. As the sentencing judge pointed out, this gave the respondent even greater emotional and social control over the complainant. Further, once such images are sent, it becomes impossible for the complainant to control how they are used or distributed. This feature of internet communication is one reason why general and specific deterrence must be paramount in sentencing for internet luring. Where this capacity of the internet is actually used by the accused, it is a serious aggravating factor, even though the creation and distribution of child pornography can be a separate offence: s. 725(1)(c).

284 The sentencing judge was accordingly correct in principle to conclude that the sentence for internet luring should be consecutive to the sentence for sexual interference. He also correctly noted that "double counting" should be avoided, in that the internet luring might be regarded as an aggravating factor in the sexual interference charge, while it was also the subject of the second conviction.

285 The sentencing judge noted that the case law suggests a range between one and three years for this offence. He then stated:

> 73 Nevertheless, I consider some of the same conduct to be an aggravating feature of both the luring and sexual interference offences. The Court must be careful not to punish the offender for the same conduct in relation to both offences. Therefore, I will consider the global sentence and adjust the luring sentence downward to avoid double-counting: *Woodward*.

> 74 In the result, I find a sentence of 3 months to be a fit sentence for the sexual luring in this case, leading to a total sentence of 18 months. I would emphasize that the sentence on the sexual luring would have been considerably higher had it been the only charge faced by Mr. Hajar.

The result, unfortunately, was a demonstrably unfit sentence. Even accepting that double-counting" must be avoided, a 3 month sentence was demonstrably unfit, especially considering that the sentence for sexual interference was at the low end of the range. An error of principle is disclosed as a result of an overemphasis of this factor. While *R. v Woodward*, 2011 ONCA 610 at paras. 46-8, 107 OR (3d) 81 did caution against double-counting, it nevertheless found an 18 month consecutive sentence for internet luring to be fit, and suggested that the low end of the range for this offence is 12 months.

> 286 At trial, the Crown proposed a 12 month consecutive sentence for the luring count. While that too might be seen as being at the lower end of the range, having regard to the aggravating and mitigating factors it is not unfit. As in *Paradee* the sentence requested at trial reflects an appropriate cap on the sentence that should be imposed on appeal.

[23] In ***Morrison*** *(supra)*, the Supreme Court of Canada was called upon to determine the constitutionality of s. 172.1(2)(a), s. 172.1(3) and s. 172.1(4). The court concluded that s. 172.1(4) did not offend the *Charter* but s. 172.1(3) did and directed the matter to be retried. In result, the majority concluded that determining the constitutionality of the mms in s. 172.1(2) would be unwise. In coming to that conclusion, Moldaver J., for the majority, offered these comments:

> 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 *Charte*r. 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. Morrisey*, 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. *(I note that at the time of writing the mms on summary convictions was 6 months but it was 90 days at the time of conviction.)*

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 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.
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> 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.
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> 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.

[24] In a separate judgment, Karakatsanis J. concluded that s. 172.1(2)(a) was unconstitutional. In doing so he offered this:

> 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. Morrisey*, 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 conservations 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. Grant*, 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).
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> 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)).5 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.
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> 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 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*.

[25] It is important to note that the present iteration of s. 172.1(2)(b), applicable in the case before me, provides for a mms of six months on summary conviction and not 90 days as was the case in ***Morrison***.

[26] Finally, in ***Cowell***, the accused was convicted of luring, and lost his s. 12 challenge to the mms in s. 172.1. He appealed both his conviction and renewed his s. 12 challenge to the mms.

[27] Benotto J.A., writing for majority, offered this on the s. 12 challenge, at paragraphs 114 to 122 and 127 to 128:

> 114 I agree with my colleague's disposition of the appeal in all ways but one. 1 would not strike down s. 172.1 (2)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.
>
> 115 My colleague concludes that the mandatory minimum sentence (although not grossly disproportionate for the appellant) is grossly disproportionate based on its application in reasonably foreseeable circumstances. He reasons that the wide range of conduct embraced by s. 172.1 (2)(a) gives rise to numerous examples where the imposition of the minimum sentence would be grossly disproportionate.
>
> 116 This is where we part company.
>
> 117 There are several reasons for my conclusion: (i) by clarifying the *mens rea* for the offence, *R. v. Morrison*, 2019 SCC 15 (S.C.C.) has narrowed the range of conduct embraced by the section; (ii) the one-year minimum does not meet the standard of gross disproportionality, particularly in light of the purpose of the legislation; (iii) the reasonable hypothetical have not been fully argued; and, (iv) the hybrid nature of the offence does not automatically render the mandatory minimum on indictment grossly disproportionate.
>
> *(1) Morrison has narrowed the range*
>
> 118 *Morrison* has clarified the *mens rea* for the child luring offence under s. 172.1. Consequently, the range of potential conduct has been significantly narrowed. The Crown must prove beyond a reasonable doubt that the accused intentionally communicated with a person who is or is believed to be underage. The accused must also have the specific intent to facilitate one of the listed offences. The "wide net" of the offence has been greatly narrowed to catch only these offenders: *Morrison*, at para. 153.
>
> *(2) Grossly disproportionate is a high bar*
>
> 119 A mandatory minimum sentence violates s. 12 of the *Charter* if it is grossly disproportionate: *Morrison*, at para. 164. Section 12 of the *Charter* prohibits any "cruel and unusual treatment or punishment." The "gross disproportionality" test that has developed under s. 12 presents a high bar: *Morrison*, at para. 165. The punishment must be "so excessive as to outrage standards of decency" (citations omitted): *R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.), at p. 1072; see also *R. v. Miller* (1976), [1977] 2 S.C.R. 680 (S.C.C.), at p. 688. Moreover, the threshold for gross disproportionality captures conduct that Canadians would find "abhorrent or intolerable": *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90 (S.C.C.), at para. 26.
>
> 120 In determining whether a provision contravenes s. 12 of the *Charter*, the purpose of the legislation must be considered. The social reality is that "access to the Internet among Canadian children is now almost universal" and "predators lurking in cyberspace, cloaked with anonymity" are able to meet, groom, and sexually exploit vulnerable children through telecommunication: *Morrison*, at para. 2. Children are defenceless to the sexual exploitation of adult predators, who are only one click away: *R. v. Woodward*, 2011 ONCA 610 (Ont. C.A.), at para. 72. The harm caused by this offence is often life-altering for innocent children: *Morrison*, at paras. 3, 153; *Woodward*, at para. 76. These considerations factor into the determination of a s. 12 *Charter* breach.

> 121 Parliament enacted *Criminal Code* provisions to ensure that predators who lure children through telecommunication receive "a punishment that reflects the gravity and seriousness of the offence": *Morrison*, at paras. 2-3. Luring attracts a high degree of moral blameworthiness, especially since its victims are "one of the most vulnerable groups within Canadian society — our children": *Morrison*, at para. 153. 1 do not agree that a one-year minimum sentence would outrage the moral standards of Canadians.
>
> 122 In my view, the one-year minimum sentence does not meet the standard of gross disproportionality. . . .
>
> *(4) The hybrid nature of the offence*
>
> 127 My colleague adopts the concurring reasons of Karakatsanis J. in *Morrison* and strikes down the mandatory minimum sentence on the basis of its application in reasonably foreseeable circumstances and the hybrid nature of the offence. I note that in *R. v. Nur* the court considered the constitutionality of the mandatory minimum sentence for a hybrid offence, but did not go so far as to say that every mandatory minimum on indictment would be grossly disproportionate and contrary to s. 12 of the *Charter*: 2015 SCC 15, [2015] 1 S.C.R. 773 (S.C.C.); *Morrison*, at para. 154.
>
> 128 Likewise, I would not go so far as to say that the mandatory minimum on indictment is grossly disproportionate because of the hybrid nature of the offence. Recall its purpose: the gravity of the offence, the harm child luring causes, and the need to send a clear message to offenders that if they "prey upon innocent children . . . [they] will pay a heavy' price" (citations omitted): *Woodward*, at para. 73.

[28] It was Trotter, J.A. to which Benotto J.A. referred as her colleague. Writing in dissent, Trotter J.A. made the following remarks (paragraphs and page numbers were not provided in the version provided to me by counsel):

> The appellant challenged the constitutionality of the mandatory minimum sentence of 12 months' imprisonment under s. 172.1 (2)(a), as well as the 6-month mandatory' minimum sentence under s. 212(4). He argued that they both constituted cruel and unusual punishment, contrary to s. 12 of the *Charter*.
>
> The trial judge rejected both challenges and imposed the respective minimum sentences, ordering that they be served concurrently. The trial judge gave his ruling before this court held in *Morrison* that s. 172.1 (2)(a) violated s. 12 and was of no force and effect: see *R v. Morrison*, 2017 ONCA 582, 350 C.C.C. (3d) 161 (Ont. C.A.) ("*Morrison* (ONCA)"), rev'd 2019 SCC 15, 375 C.C.C. (3d) 153 (S.C.C.) ("*Morrison* (SCC)").
>
> As discussed below, an appeal to the Supreme Court was allowed in part. The Court ordered a new trial. A majority of the Court declined to pronounce on the constitutional validity of s. 172.1(2)(a), but offered helpful observations on how the issue might be approached in the future. Karakatsanis J. (with whom Abella J. concurred on this issue) would have declared the provision of no force or effect.
>
> This sequence of events makes this appeal somewhat unique. At the time the appellant filed his notice of appeal in this court, *Morrison* (ONCA) had determined that s. 172.1 (2)(a) violates s. 12 of the *Charter*. However, given the manner in which the Supreme Court ultimately disposed of the case, *Morrison* (ONCA) no longer has precedential value. Moreover, and as I explain in greater detail below, in this court Pardu J.A. relied

> on her characterization of the fault requirement in s. 172.1 as largely objective to find that the mandatory minimum sentence in s. 172.1 (2)(a) infringed s. 12. *Morrison* (SCC) clarified s. 172.1 such that the *mens rea* is now understood to be subjective in nature. Thus, a critical plank in the reasoning of Pardu J.A. has been removed.
>
> Notwithstanding the refined *mens rea* requirement for offences committed under s. 172.1, I am of the view that the mandatory minimum sentence in s. 172.1 (2)(a) violates s. 12 of the *Charter*. In reaching this conclusion I rely heavily on the reasons of Karakatsanis J., and on some of the observations made by the majority. As I explain below, a sentence of 12 months' imprisonment is not grossly disproportionate as applied to the appellant. However, the broad range of conduct covered by s. 172.1 permits its application in reasonably foreseeable circumstances where the imposition of the mandatory minimum sentence would be grossly disproportionate. Moreover, the discrepancy between the minimum sentences for offences under s. 172.1 that are prosecuted by indictment and those that are prosecuted summarily also illustrates that, in some circumstances, the imposition of the mandatory minimum sentence in the former situation is grossly disproportionate.

[29] Trotter J.A. then continued by detailing the litigation history of ***Morrison***, including summarizing the results at the Supreme Court of Canada which I had previously referenced. He then offered this:

> However, I agree with Karakatsanis J. that the mandatory minimum sentence in 172.1(2)(a) must be declared unconstitutional based on its application in reasonably foreseeable circumstances. I acknowledge that, as Moldaver J. clarified in *Morrison* (SCC), convictions under s. 172.1 will always be accompanied by a high level of moral blameworthiness. However, the wide range of conduct embraced by s. 172. l(2)(a), including the varied nature of the designated secondary offences, gives rise to situations in which the imposition of the one-year mandatory minimum sentence would be grossly disproportionate. Although these "outlier" cases are not likely to occur or to be prosecuted with great frequency, they are nevertheless reasonably foreseeable and demonstrate that in some cases, the mandatory minimum sentence in s. 172.1 (2)(a) is grossly disproportionate.
>
> This point is illustrated in a different way in *R. v Chang*, 2019 ONCA 924 (Ont. C. A.), a recent decision of this court. Sentenced after s. 172.1(2)(a) was struck down in *Morrison* (ONCA), but before *Morrison* (SCC), Chang received a sentence of eight months' imprisonment. On appeal, this court reduced the sentence to six months less a day based on adverse immigration consequences faced by Chang under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27: *Chang*, at para. 15; see *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739 (S.C.C.). This court said, at para. 14, that this reduction, "will not render the sentence demonstrably unfit, having regard to all the circumstances of the offence and this youthful first offender."
>
> I also adopt the reasons of Karakatsanis J. in relation to the hybrid nature of the offence. As discussed, although the sentences imposed for those who pleaded guilty do not persuade me that the appellant's sentence was too severe, the two-tiered mandatory minimum that was in place at the time the appellant was sentenced (one year vs. 90 days) demonstrates the comparative harshness of the upper tier. In combination with the

expansive reach of s. 172.1, this renders s. 172.1(2)(a) grossly disproportionate in reasonably foreseeable circumstances, thereby infringing s. 12 of the *Charter*.

[30] What guidance can I take from all of this?

[31] Firstly, the Alberta Court of Appeal, although not called upon to establish a benchmark for luring did offer the view that a range of 1 to 3 years had been emerging for the crime. The majority also suggest a range of 2 to 4 years might be more appropriate. I am not bound by those observations, but they do indicate a likely direction that court will take in sentencing those guilty of luring. If, as suggested, one year is a floor and that floor may be too low, then a one year minimum is not likely to be seen by the Alberta Court of Appeal as violating s. 12 of the *Charter*.

[32] Secondly, the opinions of Karakatsanis J. and Trotter J.A. turned upon the fact that the difference between the mms on summary conviction and indictment was strong evidence of disproportionality. While the 4 to 1 difference was not the only factor which prompted Karakatsanis J. to conclude that the mms was unconstitutional, she opined, at paragraph 186, that the 4 to 1 difference "strongly suggests" that the mms violates s. 12. She said, at paragraph 186, the fact that the section allows for a mms of 90 days on summary conviction, "a jail sentence *one quarter*" (italics in original) the length of the mandatory minimum under s. 172.1(2)(a) "strongly supports the assertion that the one year mandatory minimum is grossly disproportionate".

[33] I think it fair to conclude that the 4 to 1 ratio was a tipping point factor for Justice Karakatsanis in concluding the mms did not pass constitutional muster. In the case before me, the mms on summary conviction is six months and therefore the difference is 2 to 1 or six months more than might be proportionate, fit and proper. If one focusses on this factor alone, I don't think, nor is there any evidence nor anecdote to cause me to conclude that a person convicted of this offence might have been sentenced to six months on summary conviction but, instead, was sentenced to a year would outrage society's standards of decency and cause Canadians to react with abhorrence and to consider such sentence intolerable.

[34] While such a sentence may be excessive, it is difficult to accept it as being grossly disproportionate, especially given the opinions expressed by Moldaver, J.A. (as he then was) in ***Woodward*** and his impression of Rosenburg, J.A.'s opinion in ***R v Jarvis*** (2006) 211 CCC (3rd) 20 (ONCA) and the opinions of the Alberta Court of Appeal in ***Hajar***.

[35] In my view, there is, indirectly, some evidence that society would not find it abhorrent or intolerable if any particular person merited a sentence less than the mms. That evidence is found in Canada's elected representatives passing consistent amendments to the *Criminal Code*, consistently increasing the maximum penalty for the commission of this crime and first imposing and then consistently increasing the mms associated with the prosecution of the offence either summarily or by indictment.

[36] Therefore, despite the disparity, despite the potentially wide net, despite the sentences imposed on others who have been found guilty of this offence and not subjected to a mms or the mandatory minimum sentences currently applicable, I am not persuaded that mms in s. 172.1(2)(a) in unconstitutional.

[37] A sentence of 12 months may be excessive for 20-year old accused who befriends a 15-year old whom he met in a social setting and then, over some months of electronic communications, proposes that the 15-year old send a photo of her and her friend kissing, or he

sends her a text message referring to a sexual encounter between him, her and another man. That is the hypothetical put before me. However, the communication bypasses the child's guardians, amounts to a home invasion and puts a child in an impossible situation. She is pressured to make adult decisions with potential life-altering consequences, without the knowledge, skill, self-confidence and assertiveness to do so in an informed and intelligent way. No child, however precocious, should ever be forced to face that circumstance. Canadians are right to be intolerant of those who would put a child in such a position. Therefore, while perhaps excessive, a sentence of one year would not be abhorrent or intolerable in the circumstances posited as the hypothetical.

[38] I have concluded that the mms in s. 172.1(2)(a) is constitutionally valid in regard to the hypothetical presented to me.

B. Constitutionality of mms in s. 172.1(2)(a) in Mr. Reeve's circumstances

[39] Although the hypothetical I rejected is a sanitized version of the actual circumstances in this case and, therefore, Mr. Reeve's circumstances and the actual circumstances of the offence are not going to be sufficient to make the mms unconstitutional, it behooves me to complete the analysis.

[40] In the particular circumstances of this case we have both the request to send a picture of the friends kissing and the reference to a sexual encounter between the accused and the 15-year old victim and another man. The second of these communications occurred after the factual circumstances which resulted in Mr. Reeve's conviction for sexual interference and his conviction for invitation to sexual touching. The last communication occurred after Mr. Reeves supplied the victim with alcohol. Finally, Mr. Reeve's is 45, not 20 years old.

[41] In those circumstances, a sentence of one year would not be grossly disproportionate.

C. Sentence

1. Aggravating and mitigating factors

[42] There are mitigating factors present. Mr. Reeves has been prevented, by the terms of his release, from attending any of his children's sporting activities. Both children are active at a high level in either hockey or ringette and as a result have been deprived of their father's support and he of the chance to provide it.

[43] Mr. Reeves has no criminal record. Mr. Reeves is a trained and experienced social worker who has been employed continuously in that field, mostly in the child welfare sphere. He had been deprived of that employment by virtue of these events. He does however remain employed as a delivery driver.

[44] There are aggravating circumstances. Mr. Reeves is 45 years old, much much older than his victims. Mr. Reeves provided alcohol to both victims. Providing alcohol was an act which, whatever the motivation, could at least impact the will of the complainants to resist Mr. Reeves' advances.

[45] The electronic communication with K was longstanding, and although not sexual, is consistent with what has come to be known as grooming. K and Mr. Reeves knew each other from sports and K's parents knew Mr. Reeves. Therefore, although not a relationship of trust, it is obvious that access to K would likely not have occurred without that familiarity.

[46] As well, although mitigating, Mr. Reeves has the support of his father, his ex-wife, his children and others. Mr. Reeves has pursued counselling to help with deal with the sexual abuse he suffered in his youth which he hopes to continue and which, I accept, has been helpful to him. Finally, I accept Mr. Reeves' expression of remorse as genuine.

IV. Conclusion

2. Individual Sentences

a) 172.1(1)(b) – Count #1

[47] One could certainly see a sentence of between 6 months and one year as appropriate, if there were no mms. Especially since Mr. Reeves is not the type of predator commonly described in the authorities presented to me. It is also important to remember that Mr. Reeves is being sentenced on what he did, not on what he might have been intending in the future nor on what may have happened if his crimes had gone undiscovered. Having regard to all the circumstances, I am of the view that a sentence of 10 months would have been fit and proper. However, I am constrained to impose the mms.

[48] Therefore, on Count #1, I sentence Mr. Reeves to one year in a provincial correctional institution.

b) 152 – Count #2

[49] In my view, but for the alcohol and the age difference, the factual nature to this offence might warrant a discharge. However, the presence of those two factors are sufficiently aggravating to warrant a sentence of incarceration. A sentence of 7 days consecutive is, in my view, appropriate on Count #2.

c) 151 – Count #3

[50] Again, but for the alcohol and age difference, the appropriate sentence would not involve incarceration. However, the presence of those aggravating features and Mr. Reeves' persistence do require a stern response. Additionally, a consecutive sentence is appropriate as A is a separate victim, in this case. In my view, a sentence of 14 days consecutive is appropriate on Count #3.

d) Summary

[51] As a result, Mr. Reeves is sentenced to a total of one year and 21 days.

[52] Both counsel suggested a period of probation for Mr. Reeves. I was referred to Judge Gaschler's decision in the *R v E.R.* [2019] ABPC 292. While I did not find his analysis helpful on the issue of the constitutionality of s. 172.1, I will adopt the terms of the probation order outlined in paragraph 59 of his decision. Specifically, on Mr. Reeves' release from custody he shall be bound by a probation order for a period of 18 months, the terms and conditions of which are:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify the Probation Officer in advance of any change of name or address and promptly notify the Probation Officer of any change of employment or occupation;

4. Have no contact or communication with K and/or A directly or indirectly and no contact with any members of their families;
5. Have no contact with female persons under the age of 16 years except in the company of another adult person who is aware of these probation terms;
6. Report in person within 4 business days of release to a Probation Officer in Edmonton;
7. Continue to report to Probation as required;
8. Reside where approved by Probation;
9. Do not travel outside of Alberta without the prior written approval of your Probation Officer;
10. Attend for assessment and participate in any counselling, treatment or programming as directed by your Probation Officer including sexual offender therapy;
11. Sign any waiver of information as directed providing access to information as required by your Probation Officer;
12. Provide your Probation Officer with proof in writing that you have followed through and completed any treatment, counselling or programming that you have been directed to take;

[53] I have considered a smart phone/computer ban but I am not convinced that significant restriction of freedom is justified or necessary here.

[54] As well, I have considered a s. 161 restriction but decline to make such an order as I am of view that Mr. Reeves is very unlikely to commit any related crime in the future.

[55] A fire arms prohibition will issue under s. 109(2)(a). An order in Form 52 will issue pursuant to s. 490.013(2)(b) for a period of twenty years. An order in Form 5.03 shall issue pursuant to s. 487.051(1). Such samples to be taken within 30 days of today's date.

[56] The personal property seized from the accused and the victims are to be returned to them at the conclusion of this appeal period. All other items seized are forfeit to the Crown.

Heard on the 20th day of January, 2020.
Dated at the City of Edmonton, Alberta this 30th day of January, 2020.

T.D. Clackson
J.C.Q.B.A.

Appearances:

James Rowan, Alberta Specialized Prosecutions
for the Crown

Simon Renouf Q.C. and Amanda Goodwin, Simon Renouf Professional Corporation
for the Accused (Applicant)