



SUPREME COURT OF CANADA

CITATION: R. v. Bertrand
Marchand, 2023 SCC 26

APPEALS HEARD: February 15, 16,
2023

JUDGMENT RENDERED:
November 3, 2023

DOCKETS: 39935, 40093

BETWEEN:

His Majesty The King and Attorney General of Quebec
Appellants

and

Maxime Bertrand Marchand
Respondent

- and -

**Director of Public Prosecutions, Attorney General of Ontario, Attorney
General of Saskatchewan, Attorney General of Alberta, Nunavik Civil
Liberties Association, Association québécoise des avocats et avocates de la
défense, Barbra Schlifer Commemorative Clinic and Independent Criminal
Defence Advocacy Society**
Interveners

AND BETWEEN:

His Majesty The King and Attorney General of Quebec
Appellants

and

H.V.

Respondent

- and -

**Director of Public Prosecutions, Attorney General of Ontario, Attorney
General of Saskatchewan, Attorney General of Alberta, Association des
avocats de la défense de Montréal and Independent Criminal Defence
Advocacy Society**

Intervenors

OFFICIAL ENGLISH TRANSLATION: Reasons of Côté J.

CORAM: Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

**REASONS FOR
JUDGMENT:** Martin J. (Karakatsanis, Rowe, Kasirer, Jamal and
O'Bonsawin JJ. concurring)
(paras. 1 to 174)

**REASONS
DISSENTING IN
PART:** Côté J.
(paras. 175 to 232)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

**His Majesty The King and
Attorney General of Quebec**

Appellants

v.

Maxime Bertrand Marchand

Respondent

and

**Director of Public Prosecutions,
Attorney General of Ontario,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Nunavik Civil Liberties Association,
Association québécoise des avocats et avocates de la défense,
Barbra Schlifer Commemorative Clinic and
Independent Criminal Defence Advocacy Society**

Interveners

- and -

**His Majesty The King and
Attorney General of Quebec**

Appellants

v.

H.V.

Respondent

and

Director of Public Prosecutions,

**Attorney General of Ontario,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Association des avocats de la défense de Montréal and
Independent Criminal Defence Advocacy Society**

Interveners

Indexed as: R. v. Bertrand Marchand

2023 SCC 26

File Nos.: 39935, 40093.

2023: February 15, 16; 2023: November 3.

Present: Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Sentencing — Mandatory minimum sentence — Child luring — Accused persons pleading guilty to child luring — Accused persons challenging constitutionality of mandatory minimum sentences of one year’s imprisonment prescribed for child luring as indictable offence and of six months’ imprisonment for child luring punishable on summary conviction — Whether mandatory minimum sentences constitute cruel and unusual punishment — Canadian Charter of Rights and Freedoms, s. 12 — Criminal Code, R.S.C. 1985, c. C-46, s. 172.1(2)(a), (b).

Criminal law — Sentencing — Considerations — Child luring — Accused person pleading guilty to child luring and sexual interference — Sentencing judge imposing sentence of five months' imprisonment for child luring to be served concurrently to sentence for sexual interference — Majority of Court of Appeal upholding sentencing judge's decision — Whether accused person's sentence for child luring was fit.

M pleaded guilty to one count of sexual interference contrary to s. 151(a) of the *Criminal Code* and to one count of luring a child contrary to s. 172.1(1)(b). M met the victim in person when he was 22 and she was 13 years old. He then sent her a friend request on Facebook and, for the following two years, they were in contact on social media and also met in person, and had illegal sexual intercourse four separate times. At sentencing, M challenged the one-year mandatory minimum period of incarceration set out in s. 172.1(2)(a) for persons found guilty of the indictable offence of luring a child, on the basis that it was inconsistent with s. 12 of the *Charter*, which protects against cruel and unusual punishment. The sentencing judge sentenced M to five months' imprisonment on the count of luring, to be served concurrently to the sentence imposed on the count of sexual interference. The judge found the mandatory minimum sentence infringed s. 12 of the *Charter* as it would be grossly disproportionate to the fit sentence of five months. The majority of the Court of Appeal upheld both the sentence imposed for luring and the conclusion that the mandatory minimum sentence was unconstitutional. The Crown appeals the fitness of M's sentence for luring and asks the Court to find the mandatory minimum sentence in

s. 172.1(2)(a) constitutional.

V pleaded guilty to one count of luring a child contrary to s. 172.1(1)(a) of the *Criminal Code*. V sent sexual text messages to the victim over a period of 10 days. At sentencing, V challenged the six-month mandatory minimum sentence set out in s. 172.1(2)(b) for persons found guilty of the offence of luring punishable on summary conviction, on the basis that it violated s. 12 of the *Charter*. The sentencing judge imposed a sentence of two years' probation and 150 hours of community service after finding that the mandatory minimum sentence would be grossly disproportionate to the fit sentence. On appeal, the Superior Court varied the sentence to four months' imprisonment. The court then determined that the mandatory minimum sentence infringed s. 12 since, although it was not grossly disproportionate to V's fit sentence of four months, it would be when applied to reasonably foreseeable scenarios. The Court of Appeal upheld that decision. The fitness of V's sentence is not challenged before the Court. The Crown asks the Court to find the mandatory minimum sentence in s. 172.1(2)(b) constitutional.

Held (Côté J. dissenting in part): The appeal in M's case should be allowed in part. The appeal in V's case should be dismissed.

Per Karakatsanis, Rowe, **Martin**, Kasirer, Jamal and O'Bonsawin JJ.: M's sentence for luring a child should be increased from 5 months' to 12 months' imprisonment, and it should be served consecutively, not concurrently, to his sentence for sexual interference. The mandatory minimum sentences for luring a child set out in

s. 172.1(2)(a) and (b) of the *Criminal Code* are inconsistent with s. 12 of the *Charter*, are not saved by s. 1 and therefore are of no force or effect under s. 52 of the *Constitution Act, 1982*.

To protect a range of social interests, namely the vulnerability and exploitation of children facilitated by the internet, Parliament enacted the offence of luring a child at s. 172.1 of the *Criminal Code*. The offence has three elements: (1) the accused must communicate intentionally by telecommunication; (2) with someone the accused knows or believes is under 18 years of age, and (3) for the specific purpose of facilitating the commission of a designated secondary offence listed in s. 172.1(1) with respect to the underage person. Parliament's creation of this inchoate preparatory offence that criminalizes communications that precede the perpetration of other designated secondary offences indicates that luring generates harms that are different from those secondary offences and is sufficiently wrongful and harmful to ground criminal liability. Child luring is a hybrid offence that carries a mandatory minimum sentence of one year's imprisonment if the offender is guilty of an indictable offence (s. 172.1(2)(a)) and of six months' imprisonment if the offender is guilty of an offence punishable on summary conviction (s. 172.1(2)(b)).

Pursuant to s. 718.1 of the *Criminal Code*, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. A fit and proportionate sentence must be crafted based on the particular facts of the case and in light of existing legislation and case law. Furthermore, in s. 718.01,

Parliament has specifically indicated that in sentencing offences involving abuse of children, including child luring, the objectives of denunciation and deterrence must be given primary consideration. While a judge can accord significant weight to other sentencing objectives, including rehabilitation, the provision limits judicial discretion as a judge cannot give these other objectives precedence or equivalency. In addition to the steps that Parliament has taken to punish the various forms that abuse of children may take, the Court's decision in *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, sets out sentencing principles for sexual offences against children to fully reflect and give effect to the profound wrongfulness and harmfulness of these crimes. *Friesen* sends the clear message that sentences for these crimes must account for the far-reaching and ongoing damage sexual violence causes to children, families and society at large.

With respect to the offence of child luring, understanding its wrongfulness and distinct harmfulness is integral to properly assessing its gravity and the degree of responsibility of the offender, as well as to avoiding stereotypical reasoning and the misidentification of aggravating and mitigating factors. Luring is wrongful, as adults take advantage of a child's weaker position and lack of experience online where they are particularly exposed and helpless, which repudiates the fundamental value of protecting children. Luring invades a child's personal autonomy, sexual integrity, and gravely wounds their dignity. Even when the only interactions with the child occur online, the offender's conduct is inherently wrong because it still constitutes a form of sexual abuse.

Furthermore, luring is harmful as it can constitute a form of psychological sexual violence, bringing about serious emotional and psychological harm. It also causes distinct psychological and developmental harms to young victims that differ in two main ways from harms arising from sexual contact initiated in person. First, online communications allow for abusers to abuse remotely and for manipulation and control over time, which can lead to serious and lasting psychological consequences. Second, an offender's power and effectiveness online lies in the degree to which they can control the victim and manipulate them into engaging with the abuse, which may cause a victim to feel they actively participated in their own abuse, thereby increasing self-blame and shame. Although identifying the distinct harms of luring is difficult, one way for courts to do so is by differentiating between contact-driven luring, where the offender's goal is to facilitate in-person sexual abuse, and luring that leads to sexual abuse occurring entirely online. Contact-driven luring is not necessarily more or less harmful than luring that leads to sexual abuse that occurs entirely online. The severity of the harm caused by the online communication will depend on the individual offender, the individual characteristics of the victim, and the unique dynamic between the offender and the victim.

Parliament has consistently raised sentences for sexual offences against children to reflect a growing awareness of their gravity, and to indicate the serious emotional and psychological harms they cause for victims. Given the wrongfulness and distinct harms of luring, this same increasingly punitive trend applies to that offence. Appellate intervention in a sentencing judge's decision will be justified only if a

sentence is demonstrably unfit or if the judge committed an error in principle that impacted the sentence imposed. In M's case, the sentencing judge committed errors in principle that impacted the assigned sentence of five months' imprisonment ordered to be served concurrently and that warranted appellate intervention that the majority of the Court of Appeal failed to undertake. Specifically, the judge erred by (1) minimizing the harm caused to the victim by failing to recognize the grooming that did occur, which should have served as an aggravating factor on sentencing; (2) misconstruing the offender's actions, which caused her to unduly minimize the wrongfulness and harms of the luring offence; and (3) assigning a concurrent sentence for the luring offence. To properly account for the distinct legal interests that the luring offence protects, that is, the vulnerability and exploitation of children facilitated by the internet, the sentences should have been consecutive. Parliament's legislative initiatives, the distinct harm caused by the online communication, and the aggravating and mitigating factors instead justify a sentence of 12 months' imprisonment for M.

For a mandatory minimum sentence to be found unconstitutional pursuant to s. 12 of the *Charter*, it must be so excessive as to outrage standards of decency. Whether the mandatory minimum sentences in s. 172.1(2)(a) and (b) are unconstitutional requires a two-stage inquiry that involves a contextual and comparative analysis. First, a court must set a fit and proportionate sentence for the individual offenders before the court and possibly other reasonably foreseeable offenders. Second, a court must determine whether the mandatory minimum requires imposing a sentence that is grossly disproportionate to the otherwise fit and

proportionate sentence. This involves consideration of the scope and reach of the offence, the effects of the penalty on the individual or reasonably foreseeable offender, and the penalty and its objectives.

While a proper understanding of the wrongfulness and harmfulness of luring will lead to significant penalties in most circumstances, the constitutional analysis under s. 12 of the *Charter* does not merely ask whether the mandatory minimum is cruel and unusual in common cases. Punishments can be impugned where they infringe the s. 12 *Charter* rights of a reasonably foreseeable offender. Indeed, the use of reasonably foreseeable scenarios is expressly designed to test the lower end of the spectrum of conduct captured by the offence. As such, when parties raise hypothetical scenarios as part of the adversarial process, a court should not dismiss a constitutional challenge without considering (1) whether the scenario is reasonably foreseeable and, if so, (2) whether the representative offender's scenario could render the impugned law unconstitutional.

In M's case, the fit sentence of 12 months' incarceration mirrors the one-year mandatory minimum sentence. As a result, the minimum sentence is not grossly disproportionate in his circumstances. In V's case, the six-month mandatory minimum term of imprisonment is not grossly disproportionate to the fit sentence of four months' imprisonment. Reasonably foreseeable scenarios must therefore be considered to determine whether the mandatory minimum sentences are unconstitutional. For the purposes of the constitutionality analysis for the one-year mandatory minimum

sentence in s. 172.1(2)(a), the first reasonably foreseeable scenario involves a representative offender who is a first-year high school teacher in her late 20s with bipolar disorder and with no criminal record. One evening, she texts her 15-year-old student to inquire about a school assignment. Feeling manic, she directs the conversation to sexual matters. The two meet that evening and participate in sexual touching. The offender does not engage inappropriately with the student again and pleads guilty and expresses remorse on sentencing. For the purposes of the constitutionality analysis for the six-month mandatory minimum sentence in s. 172.1(2)(b), the reasonably foreseeable scenario involves an 18-year old representative offender who is in a relationship with a 17-year-old. In one text, the offender asks her to send him an explicit photo. She does, and he then forwards that photo to his friend without his girlfriend's knowledge. This friend, who is also 18, does not transmit this photo, but retains it on his mobile phone.

In addressing the first stage of the s. 12 analysis of setting the fit and proportionate sentence for the representative offender, courts must define as specific a sentence as possible by considering the sentencing objectives set out in the *Criminal Code* and by examining any aggravating and mitigating factors. A fit sentence for the luring offence committed by the representative offender in the first scenario is a 30-day intermittent sentence. Such a sentence recognizes the inherent seriousness and potential harms associated with the offence and appropriately denounces the offender's conduct, while being mindful of her diminished moral blameworthiness and the mitigating factors at play. A fit sentence for the luring offence committed by the representative

offender in the second scenario is a six-month conditional discharge, with strict probationary terms. The offender engaged in a serious breach of the victim's privacy and dignity that should be condemned by a criminal sanction. However, the significant mitigating factors in this scenario, most notably the offender's youth and lack of a criminal record, warrant a sentence on the low end of the spectrum.

At the second stage of the s. 12 analysis, the scope and reach of the offence must be examined. Courts should assess how broad a range of conduct is captured by the *actus reus* and *mens rea* of the offence and consider the included degree of variation in the offence's gravity and the offender's culpability. The *actus reus* of child luring includes communication with the victim by use of any telecommunication platform. This demonstrates the massive breadth of the luring offence. Regarding the *mens rea*, the specific intent element — that the accused must communicate with the purpose of facilitating a designated offence — is broad. An accused may impulsively communicate in a sexual manner — and in that moment have the specific intent required — without having taken time beforehand to plan or prepare to execute a secondary offence. The offence therefore captures a wide range of designated illicit purposes with varying degrees of moral culpability. The range of conduct captured by the luring offence is also staggering. The offender need only communicate with an underage person for the purpose of facilitating one of the twenty designated secondary offences which are, amongst themselves, of varying degrees of seriousness and wide in scope. These features of the luring offence further threaten the constitutionality of its mandatory minimum penalties.

Next, in analyzing the effect of the punishment on representative offenders, courts must consider the qualities of the reasonably foreseeable offender, and then evaluate what harm may result from the impugned punishment. Evidence that imprisonment would have significant deleterious effects on an offender should be considered at this stage. In the instant scenarios, the mandatory minimum punishment is alternatively one year's or six months' incarceration. The effect of the one-year mandatory minimum on the first representative offender is harsh, as it would replace a short intermittent sentence with a year of incarceration, and the offender's individual circumstances, namely her mental illness, would likely make her experience of incarceration perilously grave. The second representative offender is a youthful first-time offender who, holding high rehabilitative prospects, should benefit from the shortest possible sentence proportionate to the offence. In prison, youthful offenders are often bullied, pressured to join adult prison gangs, and are vulnerable to segregation placements. The six-month mandatory minimum is a far cry from the shortest possible rehabilitative sentence for this offender. These factors indicate the mandatory minimum sentences' constitutional infirmity.

Finally, turning to the penalty and its objectives, luring is a serious offence that must be punished accordingly. The offence dovetails with s. 718.01 which directs that in imposing sentences for offences involving abuse of children, primary consideration must be given to the objectives of denunciation and deterrence. Parliament's decision to increase the maximum penalties over the years for the luring offence indicates its view of the gravity of the offence. Parliament enacted s. 172.1 in

response to the growth of the internet as a burgeoning domain for predators to target children. Child luring not only lays the foundation for dangerous in-person criminal offences, it also causes its own distinct harm to child victims. However, the mandatory minimum sentences go beyond what is necessary to achieve Parliament's sentencing objectives. The incredible breadth of the luring offence and its harsh effect on representative offenders paired with the discordant internal scheme of the penalty renders the mandatory minimum sentences in s. 172.1(2) constitutionally infirm. The mandatory minimum penalties in both s. 172.1(2)(a) and (b) are therefore grossly disproportionate to the fit sentences for the representative offenders and hence unconstitutional.

Per Côté J. (dissenting in part): The appeals should be allowed. There is agreement with the majority concerning the sentence to be imposed on M. However, the minimum terms of imprisonment of six months or one year, depending on whether the Crown proceeds summarily or by indictment, as provided for in s. 172.1(2)(a) and (b) of the *Criminal Code*, are not contrary to s. 12 of the *Charter*. The four-month sentence imposed on V should therefore be set aside and the mandatory minimum sentence of six months' imprisonment should be imposed on him, with a permanent stay of execution.

According to *Friesen*, courts must impose more severe sentences on offenders who have committed offences that involve the abuse of children and must prioritize denunciation and deterrence, as required by s. 718.01 of the *Criminal Code*.

The imposition of minimum terms of imprisonment of one year on M and six months on V is not cruel and unusual. Nor do the two reasonably foreseeable hypothetical scenarios identified by the majority show that the minimum sentences provided for in s. 172.1(2) are grossly disproportionate.

For the offender in the first reasonably foreseeable hypothetical scenario, a 30-day term of imprisonment to be served intermittently is far too lenient a sentence. The conduct of an offender who takes advantage of her status as a teacher to exploit a child for sexual purposes is highly blameworthy and is likely to have devastating consequences for the child victim. This harm is all the more serious given the fact that the commission of the offence involves abuse of a position of trust and authority. Moreover, the fact that an act was committed spontaneously does not automatically lead to the conclusion that an offender had no subjective intent to act and that the conduct in question is therefore less blameworthy. The absence of grooming and premeditation must have a neutral effect on sentencing. Given the moral blameworthiness inherent in an offence like child luring, the abuse of a position of trust and the commission of an underlying offence, and also given the significant age difference between the offender in the first scenario and the complainant as well as the complainant's vulnerability, the fit and appropriate sentence is a nine-month term of imprisonment. Such a penalty acknowledges the role played by the offender's mental illness, along with her guilty plea and the remorse she expressed.

The fit and appropriate sentence for the offender in the second reasonably foreseeable hypothetical scenario — who was in a romantic relationship with the underage victim and who abused a position of trust in relation to her — is not a conditional discharge but rather a six-month term of imprisonment. Denunciation and deterrence must be prioritized in the context of the commission of an offence involving the abuse of the offender’s intimate partner as well as in cases involving sexual violence against a minor, two aggravating circumstances that increase the subjective gravity of the offence. Rehabilitation of an offender with no record who has just reached adulthood is not a paramount factor for serious offences or offences involving violence. The weight to be given to the offender’s young age and to the absence of a criminal record therefore depends on the nature of the offence of which the offender is convicted. Taking advantage of the existence of a relationship of trust is likely to increase the harm to the victim and thus the gravity of the offence. It will be more difficult to grant a discharge for offences committed against a child or an intimate partner.

Given that the fit and appropriate sentence is equal to or greater than a six-month term of imprisonment in both reasonably foreseeable hypothetical scenarios, the first stage of the analytical framework that must be applied under s. 12 of the *Charter* decides the constitutionality of s. 172.1(2)(b). The second stage of the analytical framework therefore concerns the constitutionality of the one-year minimum term of imprisonment set out in s. 172.1(2)(a).

To begin with, while the offence of child luring is broad in scope, requiring a high level of *mens rea* ensures that the offence captures only conduct that involves a high degree of moral blameworthiness as well as serious harm or a risk of such harm. Even when the offence of luring is committed in the context of a police sting operation that does not involve children, the offence involves conduct that is undeniably very serious, and it must never be seen as a victimless crime. In addition, one must be careful not to emphasize the fact that it is not necessary for the offender to have committed one of the listed underlying offences in order to be convicted of child luring. Sophistication and premeditation also reveal nothing about the scope of the offence, because they are not essential elements of the offence.

Next, the effects of the minimum term of imprisonment on the offenders in the reasonably foreseeable hypothetical scenarios are not incompatible with human dignity. Nothing in the record makes it possible to identify the precise harm associated with the additional period of imprisonment of three months in the first case and six months in the second case if the offence is prosecuted by indictment. Since the period is relatively short, its effects are not incompatible with human dignity. The logical consequence of finding that the individual circumstances of the offender in the first scenario would likely make her experience of incarceration perilously grave, and that the minimum sentence is a far cry from the shortest possible rehabilitative sentence for the offender in the second scenario, is that any minimum term of imprisonment that may be imposed on an offender who has just reached adulthood or on a person with a mental illness will be grossly disproportionate, regardless of the gravity of the offence

or the circumstances surrounding its commission. This consequence is entirely inconsistent with the deference owed to Parliament.

Lastly, the minimum term of imprisonment is not grossly disproportionate to what is necessary to achieve Parliament's objectives. The difference of three or six months between the fit and appropriate sentence and the sentence provided for in s. 172.1(2)(a) is not so great as to show that the punishment chosen by Parliament grossly exceeds what is necessary to achieve its objectives of deterrence and denunciation of sexual violence against children. The fact that there may be some disproportion the application of which leads to a demonstrably unfit punishment is not sufficient to declare s. 172.1(2)(a) and (b) unconstitutional. The question is not whether Parliament chose the least restrictive means to achieve its objectives. Parliament is perfectly at liberty to prioritize denunciation and deterrence to the near complete exclusion of rehabilitation, provided that it leaves a door open for this latter objective. It has not been shown how, by creating minimum terms of imprisonment in s. 172.1(2), Parliament has completely excluded this objective.

In light of the pronouncements in *Friesen* and the high standard that applies in an analysis under s. 12 of the *Charter*, sentencing an offender to imprisonment for six months or one year for communicating with a minor for the purpose of facilitating the commission of a sexual offence or other specified offence against the minor is not one of the instances in which the demanding and rarely attained standard of gross disproportionality is met.

Cases Cited

By Martin J.

Applied: *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. Hills*, 2023 SCC 2; **considered:** *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *R. v. Rayo*, 2018 QCCA 824; *R. v. Melrose*, 2021 ABQB 73, [2021] 8 W.W.R. 467; *R. v. Paradee*, 2013 ABCA 41, 542 A.R. 222; *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269; *R. v. John*, 2018 ONCA 702, 142 O.R. (3d) 670; **referred to:** *R. v. Reynard*, 2015 BCCA 455, 378 B.C.A.C. 293; *R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173; *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551; *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3; *R. v. Collins*, 2013 ONCA 392; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. J. (T.)*, 2021 ONCA 392, 156 O.R. (3d) 161; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *R. v. Folino (2005)*, 77 O.R. (3d) 641; *R. v. Symes*, [2005] O.J. No. 6041 (QL); *R. v. Hajar*, 2016 ABCA 222, [2016] 12 W.W.R. 435; *R. v. Sutherland*, 2019 NWTSC 48, [2020] 3 W.W.R. 771; *R. v. Wall*, 2023 ABPC 3; *R. v. Misay*, 2021 ABQB 485, [2022] 1 W.W.R. 145; *R. v. R.S.F.*, 2021 MBQB 261; *R. v. Rafiq*, 2015 ONCA 768, 342 O.A.C. 193; *R. v. McCraw*, [1991] 3 S.C.R. 72; *R. v. J.R.*, 2021 ONCJ 14; *R. v. Roy*, 2020 QCCQ 4546; *R. v. M.B.*, 2020 ONSC 7605; *R. v. Miller*, 2016 SKCA 32, 476 Sask. R. 150; *Caron Barrette v. R.*, 2018 QCCA 516; *R. v. Ditoro*, 2021 ONCJ 540; *R. v. Gould*, 2022 ONCJ 187; *R. v. Cooper*, 2023 ONSC 875; *R. v. Clarke*, 2021 NLCA 8; *R. v. Aeichele*, 2023 BCSC 253; *R. v. Wolff*, 2020 BCPC 174; *Directeur des poursuites criminelles et pénales v. St-Amour*, 2021 QCCQ 6855; *R. v. Rice*, 2022 ABKB 773; *R. v. Wickramasinghe*, 2022 ONCJ

331; *R. v. Rasiah*, 2021 ONCJ 584; *R. v. Osadchuk*, 2020 QCCQ 2166; *R. v. Deren*, 2021 ABPC 84; *R. v. Sinclair*, 2022 MBPC 40; *R. v. Pentecost*, 2020 NSSC 277; *R. v. Collier*, 2021 ONSC 6827; *R. v. Kavanagh*, 2023 ONSC 283; *R. v. Moolla*, 2021 ONSC 3702; *R. v. E.F.*, 2021 ABQB 272; *R. v. Battieste*, 2022 ONCJ 573; *R. v. Faille*, 2021 QCCQ 4945; *R. v. Saberi*, 2021 ONCJ 345, 493 C.R.R. (2d) 121; *R. v. Boucher*, 2020 ABCA 208; *R. v. Kalliraq*, 2022 NUCA 6; *R. v. Razon*, 2021 ONCJ 616; *R. v. Coban*, 2022 BCSC 1810; *R. v. Bains*, 2021 ABPC 20; *Montour v. R.*, 2020 QCCA 1648; *R. v. LaFrance*, 2022 ABCA 351; *R. v. Jissink*, 2021 ABQB 102, 482 C.R.R. (2d) 167; *R. v. Lemay*, 2020 ABCA 365, 14 Alta. L.R. (7th) 45; *R. v. Aguilar*, 2021 ONCJ 87, aff'd 2022 ONCA 353; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211; *Desjardins v. R.*, 2015 QCCA 1774; *R. v. Borde* (2003), 63 O.R. (3d) 417; *R. v. McDonnell*, [1997] 1 S.C.R. 948; *R. v. Gummer* (1983), 38 C.R. (3d) 46; *R. v. Gillis*, 2009 ONCA 312, 248 O.A.C. 1; *R. v. Morton*, 2021 ABCA 29; *R. v. McLean*, 2016 SKCA 93, 484 Sask. R. 137; *Laguerre v. R.*, 2021 QCCA 1537; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. R.A.R.*, 2000 SCC 8, [2000] 1 S.C.R. 163; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *R. v. Bissonnette*, 2022 SCC 23; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Faroughi*, 2020 ONSC 780; *R. v. Koenig*, 2019 BCPC 83; *R. v. Ward*, 2019 NSPC 72; *R. v. Fawcett*, 2019 BCPC 125; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *R. v. Parranto*, 2021 SCC 46; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Laberge* (1995), 165 A.R. 375; *R. v. Murphy*, 2014

ABCA 409, 593 A.R. 60; *R. v. Vienneau*, 2015 ONCA 898; *R. v. Hood*, 2016 NSPC 19, 371 N.S.R. (2d) 324; *R. v. Hood*, 2016 NSPC 78; *R. v. Ayorech*, 2012 ABCA 82, 522 A.R. 306; *R. v. Tremblay*, 2006 ABCA 252, 401 A.R. 9; *R. v. Belcourt*, 2010 ABCA 319, 490 A.R. 224; *R. v. Resler*, 2011 ABCA 167, 505 A.R. 330; *R. v. Lundrigan*, 2012 NLCA 43, 324 Nfld. & P.E.I.R. 270; *R. v. Ellis*, 2013 ONCA 739, 303 C.C.C. (3d) 228; *R. v. Priest* (1996), 30 O.R. (3d) 538; *R. v. Tan*, 2008 ONCA 574, 268 O.A.C. 385; *R. v. T. (K.)*, 2008 ONCA 91, 89 O.R. (3d) 99; *R. v. Stein* (1974), 15 C.C.C. (2d) 376; *R. v. S. (S.)*, 2014 ONCJ 184, 307 C.R.R. (2d) 147; *R. v. Saffari*, 2019 ONCJ 861; *R. v. Dickson*, 2007 BCCA 561, 228 C.C.C. (3d) 450; *R. v. Shevchenko*, 2018 ABCA 31; *R. v. Vivian*, 2001 ABQB 468, 289 A.R. 378; *R. v. Sulek*, 2011 ABPC 314, 21 M.V.R. (6th) 336; *R. v. Legg*, 2014 ABPC 238, 26 Alta. L.R. (6th) 181; *R. v. Valiquette* (1990), 60 C.C.C. (3d) 325; *R. v. Brown*, 2015 ONCA 361, 126 O.R. (3d) 797; *R. v. Laine*, 2015 ONCA 519, 338 O.A.C. 264; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *R. v. Robinson* (1974), 19 C.C.C. (2d) 193; *R. v. Hynes* (1991), 89 Nfld. & P.E.I.R. 316; *R. v. C.D.R.*, 2020 ONSC 645; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96.

By Côté J. (dissenting in part)

R. v. Friesen, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. Hajar*, 2016 ABCA 222, [2016] 12 W.W.R. 435; *R. v. L. (J.-J.)* (1998), 126 C.C.C. (3d) 235; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Bissonnette*, 2022 SCC

23; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *R. v. Hills*, 2023 SCC 2; *R. v. Lloyd*, 2016 SCC 13, [2016] S.C.R. 130; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269; *R. v. Laberge* (1995), 165 A.R. 375; *R. v. S.R.*, 2008 QCCA 2359; *R. v. Barrett*, 2013 QCCA 1351; *R. v. D.B.*, 2013 QCCA 2199; *R. v. S.J.B.*, 2018 MBCA 62; *R. v. Audet*, [1996] 2 S.C.R. 171; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *R. v. Rayo*, 2018 QCCA 824; *R. v. Bergeron*, 2016 QCCA 339; *R. v. Jarvis* (2006), 211 C.C.C. (3d) 20; *Montour v. R.*, 2020 QCCA 1648; *R. v. Faille*, 2021 QCCQ 4945; *R. v. Jissink*, 2021 ABQB 102, 482 C.R.R. (2d) 167; *R. v. John*, 2018 ONCA 702, 142 O.R. (3d) 670; *Medvedev v. R.*, 2013 QCCA 540; *R. v. Laurendeau*, 2007 QCCA 1593; *R. v. Davidson*, 2021 QCCA 545; *R. v. Cunningham*, 2023 ONCA 36, 166 O.R. (3d) 147; *R. v. Stone*, [1999] 2 S.C.R. 290; *R. v. Butcher*, 2020 NSCA 50, 387 C.C.C. (3d) 417; *R. v. Priest* (1996), 30 O.R. (3d) 538; *R. v. Tan*, 2008 ONCA 574, 268 O.A.C. 385; *R. v. T. (K.)*, 2008 ONCA 91, 89 O.R. (3d) 99; *R. v. Ahmed*, 2017 ONCA 76, 136 O.R. (3d) 403; *R. v. Brown*, 2015 ONCA 361, 126 O.R. (3d) 797; *R. v. Khalid*, 2010 ONCA 861, 103 O.R. (3d) 600; *Lévesque v. R.*, 2021 QCCA 1072; *R. v. Bergeron*, 2013 QCCA 7; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551; *R. v. Alicandro*, 2009 ONCA 133, 246 C.C.C. (3d) 1; *R. v. Smith*, [1987] 1 S.C.R. 1045.

Statutes and Regulations Cited

Act to amend the Criminal Code (luring a child), S.C. 2007, c. 20, s. 1.

Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32, s. 24.

Bill C-15, *Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985, c. 19 (3rd Supp.).

Canadian Charter of Rights and Freedoms, ss. 1, 12.

Constitution Act, 1982, s. 52.

Criminal Code, R.S.C. 1985, c. C-46, ss. 151, 152, 153(1), 155, 160(3), 163.1, 170, 171, 172.1, 173(2), 271, 272, 273, 279.011, 279.02(2), 279.03(2), 280, 281, 286.1(2), 286.2(2), 286.3(2), 718, 718.01, 718.1, 718.2, 718.3(4)(b)(i), (7), 730(1).

Criminal Law Amendment Act, 2001, S.C. 2002, c. 13, s. 8.

Interpretation Act, R.S.C. 1985, c. I-21, s. 35(1) “telecommunications”.

Safe Streets and Communities Act, S.C. 2012, c. 1, s. 22.

Tougher Penalties for Child Predators Act, S.C. 2015, c. 23, s. 11.

Authors Cited

Bailey, Jane, and Carissima Mathen. “Technology-Facilitated Violence Against Women & Girls: Assessing the Canadian Criminal Law Response” (2019), 97 *Can. Bar Rev.* 664.

Canada. Office of the Correctional Investigator. *A Legacy of Missed Opportunities: The Case of Ashley Smith*, by Howard Sapers, November 23, 2011 (online: <https://oci-bec.gc.ca/en/content/speaking-notes-mr-howard-sapers-legacy-missed-opportunities-case-ashley-smith-health-law>; archived version: https://www.scc-csc.ca/cso-dce/2023SCC-CSC26_1_eng.pdf).

Canada. Office of the Correctional Investigator. *Annual Report 2021-2022*. Ottawa, 2022.

Canada. Office of the Correctional Investigator and Office of the Provincial Advocate for Children and Youth. *Missed Opportunities: The Experience of Young Adults Incarcerated in Federal Penitentiaries*. Ottawa, 2017.

Carlton, Alessandra. “Sextortion: The Hybrid ‘Cyber-Sex’ Crime” (2020), 21:3 *N.C. J.L. & Tech.* 177.

- Elliott, Ian A. “A Self-Regulation Model of Sexual Grooming” (2017), 18 *Trauma, Violence, & Abuse* 83.
- Gilbert, Paul. “What Is Shame? Some Core Issues and Controversies”, in Paul Gilbert and Bernice Andrews, eds., *Shame: Interpersonal Behavior, Psychopathology and Culture*. New York: Oxford University Press, 1998, 3.
- Hanson, Elly. “The Impact of Online Sexual Abuse on Children and Young People”, in Jon Brown, ed., *Online Risk to Children: Impact, Protection and Prevention*, 1st ed. Hoboken, N.J.: Wiley Blackwell, 2017, 97.
- Karaian, Lara, and Dillon Brady. “Revisiting the ‘Private Use Exception’ to Canada’s Child Pornography Laws: Teenage Sexting, Sex-Positivity, Pleasure, and Control in the Digital Age” (2019), 56 *Osgoode Hall L.J.* 301.
- Kloess, Juliane A., et al. “A Qualitative Analysis of Offenders’ Modus Operandi in Sexually Exploitative Interactions With Children Online” (2017), 29 *Sex. Abuse* 563.
- Paquette, Sarah, et Francis Fortin. “Les traces numériques laissées par les cyberdélinquants sexuels: identités virtuelles, mensonges et protection de l’anonymat” (2021), 74 *R.I.C.P.T.S.* 387.
- Parent, Hugues, et Julie Desrosiers. *Traité de droit criminel*, t. III, *La peine*, 3^e éd. Montréal: Thémis, 2020.
- Ruby, Clayton C. *Sentencing*, 10th ed. Toronto: LexisNexis, 2020.
- Say, Gökçe Nur, et al. “Abuse Characteristics and Psychiatric Consequences Associated with Online Sexual Abuse” (2015), 18 *Cyberpsychol., Behav., and Soc. Netw.* 333.
- Steel, Jennifer, et al. “Psychological sequelae of childhood sexual abuse: abuse-related characteristics, coping strategies, and attributional style” (2004), 28 *Child Abuse & Negl.* 785.
- Zaccour, Suzanne, et Michaël Lessard. “La culture du viol dans le discours juridique: soigner ses mots pour combattre les violences sexuelles” (2021), 33 *C.J.W.L.* 175.

APPEAL from a judgment of the Quebec Court of Appeal (Levesque, Cotnam and Beaupré JJ.A.), 2021 QCCA 1285, [2021] AZ-51790428, [2021] Q.J. No. 9996 (QL), 2021 CarswellQue 23990 (WL), affirming a declaration of

unconstitutionality of the mandatory minimum sentence in s. 172.1(2)(a) of the *Criminal Code* and a sentence entered by Bélanger J.C.Q., 2020 QCCQ 1135, [2020] AZ-51677243, [2020] J.Q. n° 1779 (QL), 2020 CarswellQue 2109 (WL). Appeal allowed in part, Côté J. dissenting in part.

APPEAL from a judgment of the Quebec Court of Appeal (Schrager, Moore and Kalichman JJ.A.), 2022 QCCA 16, [2022] AZ-51821456, [2022] Q.J. No. 51 (QL), 2022 CarswellQue 21032 (WL), affirming a decision of Lachance J., 2021 QCCS 837, [2021] AZ-51747400, [2021] J.Q. n° 2257 (QL), 2021 CarswellQue 3559 (WL), which affirmed a declaration of unconstitutionality of the mandatory minimum sentence in s. 172.1(2)(b) of the *Criminal Code* and varied a sentence entered by Garneau J.C.Q. Appeal dismissed, Côté J. dissenting.

Lina Thériault, Nicolas Abran and Joanny Houde St-Pierre, for the appellant His Majesty The King (39935).

Éric Bernier and Lina Thériault, for the appellant His Majesty The King (40093).

Alexandre Duval, Michel Déom, Sylvain Lebœuf and Julie Dassylva, for the appellant the Attorney General of Quebec (39935).

Maxime Seyer-Cloutier, Alexandre Duval, Sylvain Lebœuf and Julie Dassylva, for the appellant the Attorney General of Quebec (40093).

Samuel Bérubé de Deus, for the respondent Maxime Bertrand Marchand.

Vincent R. Paquet and *Tristan Desjardins*, for the respondent H.V.

Julie Laborde and *François Lacasse*, for the intervener the Director of Public Prosecutions.

Vallery Bayly and *Jennifer A. Y. Trehearne*, for the intervener the Attorney General of Ontario.

Grace Hession David and *Katherine Roy*, for the intervener the Attorney General of Saskatchewan.

Andrew Barg, for the intervener the Attorney General of Alberta.

Christine Renaud, for the intervener the Nunavik Civil Liberties Association.

Hugo Caissy, for the intervener Association québécoise des avocats et avocates de la défense.

Neha Chugh, for the intervener the Barbra Schlifer Commemorative Clinic.

Réginal Victorin and *Walid Hijazi*, for the intervener Association des avocats de la défense de Montréal.

Caroline L. Senini, for the intervener the Independent Criminal Defence Advocacy Society.

The judgment of Karakatsanis, Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ. was delivered by

MARTIN J. —

I. Overview

[1] Modern means of communication, including the internet, permit unprecedented and unsupervised access to children¹ in many places once thought to be safe havens, such as their homes. Children, who now spend significant amounts of time online, are increasingly susceptible to online exploitation and abuse. The dangers of sexualizing children are increasingly well-documented and the harms that result from their victimization are now more fully understood. As a result, Parliament has taken several steps to prevent and punish the various forms that abuse of children may take, including enacting a separate offence of child luring, which is set out at s. 172.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. This offence is committed when an adult uses technology to communicate with a child, or a person believed to be a child, for the

¹ For the purposes of these reasons, the terms “child” and “children” mean persons under the age of 18. References to “underage person”, “young people”, “teenagers”, “minors”, and “adolescents” should all be understood to refer to persons who are children. Where specific statutory provisions distinguish between persons under the age of 16 and persons under the age of 18, this is made clear in the reasons.

purposes of facilitating a designated secondary sexual offence against that child.²

Luring is a hybrid offence that carries two different mandatory minimum periods of incarceration depending on whether the Crown elects to proceed summarily or by indictment.

[2] Two legal issues arise in these companion appeals. First, in Mr. Bertrand Marchand's matter, the Crown appellants have questioned the fitness of Mr. Bertrand Marchand's sentence for luring. This requires an examination of the sentencing principles for this separate and specific offence, based on a modern understanding of its gravity and associated harms. In *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, this Court articulated the various serious and potentially life-long consequences associated with sexual violence against children. I build on that analysis and explain the distinct harms of the child luring offence so that its full gravity animates the governing sentencing principles and informs their constitutional status. In Mr. Bertrand Marchand's case, after applying the correct sentencing principles, I increase his sentence from five months to one year imprisonment, and find that it should be served consecutively, and not concurrently, to the other offence for which he was sentenced. In H.V.'s matter, the fitness of H.V.'s sentence was not challenged before this Court.

² As mentioned in *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, in addition to various sexual offences, the child luring provision also applies to the trafficking of a person under the age of 18 years (*Criminal Code*, s. 279.011), receiving a material benefit from the trafficking of a person under the age of 18 years (s. 279.02(2)), and withholding or destroying documents for the purpose of committing or facilitating the trafficking of a person under the age of 18 years (s. 279.03(2)).

[3] Second, both respondents in the companion appeals ask the Court to uphold the conclusions in the respective courts below that the mandatory minimum sentences outlined in s. 172.1(2)(a) and (b) are inconsistent with s. 12 of the *Canadian Charter of Rights and Freedoms* and therefore of no force or effect. Mr. Bertrand Marchand argues against the one-year mandatory minimum period of incarceration imposed when the Crown proceeds by indictment (s. 172.1(2)(a)), and H.V. impugns the six-month mandatory minimum period of incarceration imposed when the Crown proceeds summarily (s. 172.1(2)(b)). For their part, the Crown appellants ask that the Court affirm the constitutionality of the mandatory minimum sentences. While this Court has previously noted that the one-year obligatory penalty concerning s. 172.1(2)(a) is “constitutionally suspect” (*R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 146), this is the first time the Court squarely addresses the constitutional validity of both penalties.

[4] A thorough analysis reveals that these mandatory minimum sentences infringe the *Charter*’s s. 12 protection against cruel and unusual punishment. The mandatory periods of incarceration apply to such an exceptionally wide scope of conduct that the result is grossly disproportionate punishments in reasonably foreseeable scenarios.

[5] Invalidating the mandatory minimums does not mean that child luring is a less serious offence. Based on the distinct and insidious psychological damage luring generates, in some cases the appropriate penalty for child luring will be imprisonment

for a period equal to or longer than that set out in the unconstitutional mandatory minimum sentences. In these appeals, the reasonably foreseeable scenarios proffered produce fewer harms, and are presented in circumstances where the moral culpability of the offender is reduced. The broad reach and range of the offence means that a defined minimum period of imprisonment in all cases will sometimes produce results so excessive as to outrage standards of decency.

II. The Luring Offence

[6] Since 1987, Parliament has taken a “child-centred” approach to sexual offences against children, emphasized the inherently exploitative nature of adult/child sexual contact, and focussed on the profound harms these crimes produce (see Bill C-15, *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985, c. 19 (3rd Supp.); *Friesen*, at para. 53).

[7] To protect a range of social interests, Parliament enacted the offence of “luring a child”, at s. 172.1 of the *Criminal Code*, in 2002 (*Criminal Law Amendment Act, 2001*, S.C. 2002, c. 13, s. 8), and introduced the mandatory minimum sentences in s. 172.1(2)(a) and (b) of that provision, in 2012 (*Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 22). The online world and digital communications between adults and children warrant special regulation because children are particularly vulnerable to manipulation in online settings (*R. v. Rayo*, 2018 QCCA 824, at para. 141 (CanLII), per Kasirer J.A.). The internet has infinitely expanded the opportunity for offenders to attract or ensnare children and the enactment of a distinct crime protects them from the

possibility of sexual exploitation facilitated by the internet (*R. v. Reynard*, 2015 BCCA 455, 378 B.C.A.C. 293, at para. 19). The luring offence helps keep children safe in a virtual environment and was intended to meet “the very specific danger posed by certain kinds of communications via computer systems” (*R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173, at para. 36, per Doherty J.A.).

[8] Parliament thus created this inchoate preparatory offence to criminalize sexualized communications with children that precede or pave the way for the perpetration of other offences set out in the *Criminal Code* (*Rayo*, at para. 9; *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, at para. 25; *Alicandro*, at para. 20, citing A. Ashworth, *Principles of Criminal Law* (5th ed. 2006), at pp. 468-70). The purpose of s. 172.1 is both remedial and preventative. It was enacted “to combat the very real threat posed by adult predators who attempt to groom or lure children by electronic means” (*Morrison*, at para. 39). The provision seeks to safeguard children from sexual abuse by identifying and apprehending offenders before they commit a designated offence (*Legare*, at paras. 25-27, citing *Alicandro*).

[9] Section 172.1(1) and (2) reads:

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

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

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

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

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

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

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

[10] The text, context and purpose of s. 172.1(1) demonstrates that it casts, and was intended to cast, a wide net of potential liability for those who lure children in a virtual environment. This provision is triggered by communicating by a means of telecommunication, which is defined broadly in s. 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21. While the communication must be for the purpose of facilitating any one of the designated secondary offences against children found in s. 172.1, there are 20 such secondary offences listed. The scope of these secondary offences is extensive and covers a wide range of conduct, including sexual exploitation, sexual assault, incest and child pornography.

[11] Section 172.1(1) proscribes communicating by telecommunication with an underage person or a person the accused believes to be underage for the purpose of facilitating the commission of the designated secondary offences with respect to that

person (*R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3, at para. 23; *Morrison*, at para. 4). While a specific intention to facilitate a designated secondary offence forms part of the requisite *mens rea*, criminal liability will “crystallize” before any actions are taken on the part of the accused to engage in a designated offence (*R. v. Collins*, 2013 ONCA 392). The offence of luring does not require that the parties ever meet or touch.

[12] Though luring requires that an offender intend to facilitate the commission of a listed secondary offence, the offence of luring is separate and independent from that secondary offence. The preparatory conduct of luring, meant to “culminate in the commission of a completed crime” (*Legare*, at para. 25), produces its own distinct form of wrongfulness and harms. By making luring a discrete offence, Parliament indicated that these illegal communications generate harms that are different from those caught in the secondary offences in s. 172.1(1), and they are sufficiently wrongful and harmful to ground criminal liability.

[13] Many cases of luring involve multiple communications over a period of time, or what is sometimes described as “grooming”. However, luring does not require sustained contact. When the other elements of the offence are satisfied, the offence can be committed even by sending one message.

[14] The luring offence captures communications sent to an actual child, which means a person under 18 years of age (or 16 or 14, depending on the applicable paragraph). It also applies whenever the adult believes the recipient of the communication is a child, even if that is not in fact the case. As a result, criminal

liability may arise when the adult's internet interlocutor is really a police officer pretending to be a child during a "sting operation".

[15] Child luring is a hybrid offence, meaning that the Crown can choose, based on factors such as the seriousness of the accused's actions and the harm caused, to proceed either by indictment or summarily. Parliament has set two mandatory minimum penalties for luring, in s. 172.1(2)(a) and (b), depending on how the charge is laid. The indictable offence of luring for which Mr. Bertrand Marchand was charged carries a mandatory minimum punishment of one year's imprisonment and a maximum of 14 years. The summary conviction offence for which H.V. was charged carries a mandatory minimum punishment of six months' imprisonment and a maximum of two years less a day. Both offenders pleaded guilty to child luring and challenged the constitutionality of these mandatory minimum punishments as applied to themselves or other reasonably foreseeable offenders. Mr. Bertrand Marchand's sentence for one of the designated secondary offences, sexual interference, is not at issue in this appeal.

III. The Appeal of Mr. Bertrand Marchand's Sentence

[16] Before this Court, apart from the constitutional question raised, the Crown in Mr. Bertrand Marchand's case also separately appealed the fitness his five-month concurrent sentence for luring. In this part of the reasons, I set out the facts and judicial history of that appeal, apply the approach and insights of *Friesen* to the specific wrongfulness and harms of child luring, review the errors committed by the sentencing judge and set a fit and proportionate sentence for Mr. Bertrand Marchand.

A. *Facts*

[17] Maxime Bertrand Marchand met the victim in person in early August 2013, when he was 22 and she was, to his knowledge, 13 years old. In the weeks that followed, he sent her a friend request on Facebook, which she accepted. Over the next two years, they were in contact on social media and also met in person. Between August 1, 2013 and July 19, 2015, Mr. Bertrand Marchand had illegal sexual intercourse with the victim four separate times. As a result of these events, the Crown charged him with one count of sexual interference contrary to s. 151(a) of the *Criminal Code* for this time period.

[18] Mr. Bertrand Marchand was also charged with one count of luring a child contrary to s. 172.1(1)(b). Throughout their contact, Mr. Bertrand Marchand used Facebook messenger, and other means of telecommunications, to stay in touch with the victim and to arrange meetings. The time frame in the luring count was restricted to the period between February 25, 2015 and September 13, 2015. During this period, he turned 24 and she was 15.

[19] In the fall of 2014, as well as during the period covered in the indictment for the count of luring, the victim was living at a rehabilitation centre. Mr. Bertrand Marchand's online communications with the victim repeatedly raised the possibility of getting together in person and resulted in a meeting on July 19, 2015, which formed the basis for the fourth occurrence of sexual interference. On that day, the victim paid a weekend visit to her foster family, but afterwards did not return directly to the

rehabilitation centre. Instead, she went with Mr. Bertrand Marchand to his home, and he had illegal sexual intercourse with her. After this, their social media exchanges became less frequent and eventually ceased completely. In September 2015, the victim provided her statement to the police and filed a complaint. The communications that preceded and followed this final act of sexual interference form the basis for the luring charge against Mr. Bertrand Marchand.

B. *Judicial History*

[20] Mr. Bertrand Marchand pleaded guilty to one count of sexual interference and one count of child luring. He was sentenced to a 10-month term of imprisonment for sexual interference (2020 QCCQ 1135). The sentencing judge found that the appropriate sentence for the luring charge was five months' imprisonment to be served concurrently to the sentence for sexual interference. She imposed that sentence after finding the mandatory term of one year's imprisonment infringed s. 12 of the *Charter* as it would be "grossly disproportionate" to the fit sentence of five months. It was therefore declared of no force or effect in his regard.

[21] In fixing the luring sentence at five months' imprisonment, the sentencing judge determined that this was not a [TRANSLATION] "classic case" of luring where "a sexual predator . . . goes on the Internet to find a young victim and facilitate the commission of sexual offences" (para. 64). The online communications were [TRANSLATION] "instead repeated attempts, through the use of electronic conversations, to have sexual intercourse with her again" (para. 70). She also held that [TRANSLATION]

“the means used by the offender to communicate with [the victim] is a generational choice rather than a means specifically chosen to anonymously browse various websites searching for a young victim” (para. 67) and added that “[w]ere it not for the adolescent’s access to this type of media, the offender never would have succeeded in maintaining the conversations that enabled them to have their repeated rendezvous” (para. 65).

[22] The sentencing judge went on to distinguish this case from one of grooming, noting that [TRANSLATION] “the acts . . . do not constitute grooming of the adolescent for the purpose of lowering her inhibitions and convincing her to participate in sexual activities” because “[the victim] had already consented to such activities three times” (para. 70). She added that [TRANSLATION] “[t]he luring to which the offender pleaded guilty does not cover a period of grooming in preparation for the commission of other offences. It concerns communications leading to the repetition of sexual encounters” (para. 78).

[23] Ultimately, the sentencing judge found that the effects of the luring were unlike the usual cases. She concluded that the communications simply served the function of repeating “sexual encounters”, and that the communications were not grooming with the aim of “convincing [the victim] to participate in sexual activities” (para. 70). Without this grooming, she found [TRANSLATION] “[t]he distinct social interest that luring aims to protect in nearly every situation is not present here, given the specific circumstances of this case” (para. 79). As such, she concluded the luring

sentence should be served concurrently with the 10 months' imprisonment imposed in respect of the sexual interference offence.

[24] The majority of the Quebec Court of Appeal (2021 QCCA 1285) dismissed the appeal as it saw no grounds to intervene. It upheld both the punishment imposed for luring and the conclusion that the mandatory minimum sentence was unconstitutional. Levesque J.A., dissenting, would have allowed the appeal, set aside the luring sentence and the constitutional declaration of inoperability and sentenced Mr. Bertrand Marchand to 12 months' imprisonment for luring to be served concurrently to the sentence for sexual interference. Because this was the sentence required under the impugned mandatory minimum, he declined to rule on its constitutionality even though Mr. Bertrand Marchand had also impugned the penalty by advancing a reasonable hypothetical scenario involving a representative offender.

[25] The appellants invite this Court to substitute Mr. Bertrand Marchand's 5-month sentence with a sentence of 12 months' imprisonment for the luring offence. They argue the sentencing judge should not have departed from the applicable sentencing range of 12 to 24 months or imposed a concurrent sentence.

C. *Mr. Bertrand Marchand's Sentence Does Not Reflect This Court's Direction in Friesen*

[26] Mr. Bertrand Marchand was sentenced in March 2020 and this Court's decision in *Friesen* was released in April 2020. This explains the appellants' concern

that the sentencing judge's reasons were out of step with *Friesen* and Parliament's intent in sentencing offenders for sexual offences against children (A.F., at para. 21). In *Friesen*, this Court set out sentencing principles for sexual offences against children to "fully reflect and give effect to the profound wrongfulness and harmfulness" of these crimes (para. 1).

[27] A fit and proportionate sentence must be crafted based on the particular facts of the case and in light of existing legislation and case law (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 43). Pursuant to s. 718.1 of the *Criminal Code*, it is a fundamental principle that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender (see also *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089). Section 718.2 enumerates a number of other sentencing principles, including the consideration of aggravating and mitigating circumstances and parity in sentencing.

[28] Parliament has specifically indicated that in sentencing offences involving abuse of children, including child luring, the objectives of denunciation and deterrence must be given primary consideration or "*une attention particulière*" (*Friesen*, at para. 101; *Criminal Code*, s. 718.01). Section 718.01's open textured language limits judicial discretion by giving priority to these objectives, but their primary importance does not exclude consideration of other sentencing objectives, including rehabilitation (*Rayo*, at paras. 102-8). The judge can accord significant weight to other factors, but cannot give them precedence or equivalency (*Friesen*, at para. 104, citing *Rayo*, at

paras. 103 and 107-8; see also *R. v. J. (T.)*, 2021 ONCA 392, 156 O.R. (3d) 161, at para. 27).

[29] In *Friesen*, the offender was sentenced for sexual interference with a four-year-old child and the subsequent extortion of the child's mother. The Court noted expressly that, given these facts, its primary focus was to provide direction on how to impose fit and proportionate sentences for sexual interference "and closely related offences", like sexual assault and incest (para. 44).

[30] *Friesen* recognized that the focus of the legislative scheme of sexual offences against children has shifted to protect a child's personal autonomy, bodily integrity, sexual integrity, dignity and equality (paras. 51 and 55, citing E. Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (2012), at p. 68; see also *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 172, 174 and 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.). The Court outlined how sexual offences against children produce profound physical and psychological harms to the most vulnerable members of our society. It was deeply concerned with how the sexual assault of children may produce shame, embarrassment, unresolved anger, a reduced ability to trust and fear that other people would also abuse them (*Friesen*, at para. 57). It set out the disproportionate impact of violence on girls, women, Indigenous persons and other vulnerable groups.

[31] *Friesen* sends the clear message that sentences for these crimes must account for the far-reaching and ongoing damage sexual violence causes to children,

families and society at large, which may take many years to manifest. Consequently, sentences for offences involving sexual violence against children must generally increase to reflect society's modern understanding of such offences and Parliament's choice to increase the sentences associated with these crimes (paras. 3-5).

[32] *Friesen* sets out a useful method of analysis which places children, and the harm they suffer, at the centre of the discussion. Its message is not limited to offences which include physical contact. Instead, its general framework and lessons can be applied to sentencing other forms of sexual abuse of children. Indeed, its sentencing principles "also have relevance to sentencing for other sexual offences against children, such as child luring" (para. 44; see also paras. 46-47).

[33] In applying *Friesen*'s principles to the offence of child luring, I explore its inherent wrongfulness and distinct harms and the legislative trend towards increasingly punitive sentences.

(1) The Wrongfulness of Luring

[34] Sexual offences against children are crimes that wrongfully exploit children's vulnerability (*Friesen*, at para. 5). In committing the offence of luring, the adult takes advantage of the child's weaker position and lack of experience and by doing so repudiates the fundamental value of protecting children (para. 65; *R. v. Melrose*, 2021 ABQB 73, [2021] 8 W.W.R. 467, at para. 54). Children are particularly exposed and helpless online: the internet allows offenders direct, sometimes

anonymous, and often secret or unsupervised access to children, frequently in the privacy and safety of their own homes (*R. v. Folino* (2005), 77 O.R. (3d) 641 (C.A.), at para. 25; *R. v. Symes*, [2005] O.J. No. 6041 (QL), at para. 29; *R. v. Paradee*, 2013 ABCA 41, 542 A.R. 222, at para. 12; *R. v. Hajar*, 2016 ABCA 222, [2016] 12 W.W.R. 435, at paras. 279-80). In these online fora, there is often very little that can be done to shield children from the inherent power imbalance present in luring (*R. v. Sutherland*, 2019 NWTSC 48, [2020] 3 W.W.R. 771, at para. 50; *Hajar*, at para. 279). Luring wrongfully takes advantage of this unsupervised access to children and “wrongfully exploits children’s vulnerabilities” (*R. v. Wall*, 2023 ABPC 3, at para. 42 (CanLII)).

[35] The sexualization of children is itself morally blameworthy conduct. Luring invades a child’s personal autonomy, sexual integrity, and gravely wounds their dignity (*Friesen*, at para. 51). Using any person as a means to an end is unethical, but an adult’s manipulation of a child to satisfy their sexual urges is highly blameworthy conduct. It is for these reasons that luring is recognized as “manifestly harmful and wrongful” (*R. v. Misay*, 2021 ABQB 485, [2022] 1 W.W.R. 145, at para. 52). Even when the only interactions with the child occur online, the offender’s conduct is inherently wrong because it still constitutes a form of sexual abuse (*R. v. R.S.F.*, 2021 MBQB 261, at para. 91 (CanLII)). While the degree of exploitation may vary from case to case, the wrongfulness of the exploitation of children is always relevant to the gravity of the offence (*Friesen*, at para. 78).

(2) The Separate Harm of Luring

[36] It is now well established that sexual offences against children cause significant harm. The adverse impacts of sexual violence against children hinder normal social growth, and can cause several lasting psychosocial problems. When children are young, inexperienced and still developing, the harms caused by even a single instance of sexual violence can permanently alter the course of their lives. Many survivors carry childhood sexual abuse with them throughout their adulthood, and it can permeate every aspect of their lives.

[37] This Court has noted that “[e]ven in child luring cases where all interactions occur online, the offender’s conduct can constitute a form of psychological sexual violence that has the potential to cause serious harm” (*Friesen*, at para. 82, citing *R. v. Rafiq*, 2015 ONCA 768, 342 O.A.C. 193). With sexual abuse comes serious emotional and psychological harm that “may often be more pervasive and permanent in its effect than any physical harm” (*Friesen*, at para. 56, citing *R. v. McCraw*, [1991] 3 S.C.R. 72, at p. 81). Victims of luring often suffer a range of negative impacts including negative sexual development, subsequent substance misuse and depressive symptomology (G. N. Say et al., “Abuse Characteristics and Psychiatric Consequences Associated with Online Sexual Abuse” (2015), 18 *Cyberpsychol., Behav., and Soc. Netw.* 333).

[38] Child luring can also cause distinct psychological and developmental harms to young victims that differ in two main ways from harms arising from sexual contact initiated in person. First, online communication allows “for abusers to get into

the victim's head and abuse remotely" and for "manipulation and control over time" which can lead to serious and lasting psychological consequences (*Rafiq*, at para. 44). Because the communications in luring often intentionally emulate positive relationships, it can be difficult for victims to trust anyone intimately following this experience (E. Hanson, "The Impact of Online Sexual Abuse on Children and Young People", in J. Brown, ed., *Online Risk to Children: Impact, Protection and Prevention* (1st ed. 2017), 97, at p. 115).

[39] Second, since offenders cannot physically touch their victims when communicating with them online, their power and the effectiveness of their strategies often lie in the degree to which they can control the victim and manipulate them into engaging with the abuse. Victims of luring often feel that they actively participated in their own abuse, which may increase self-blame, internalization and shame. This worsens the psychological harm (J. Steel et al., "Psychological sequelae of childhood sexual abuse: abuse-related characteristics, coping strategies, and attributional style" (2004), 28 *Child Abuse & Negl.* 785, at pp. 795-96; P. Gilbert, "What Is Shame? Some Core Issues and Controversies", in P. Gilbert and B. Andrews, eds., *Shame: Interpersonal Behavior, Psychopathology and Culture* (1998), 3, at p. 27).

[40] Prior jurisprudence has shed light on this distinct harm. In *R. v. J.R.*, 2021 ONCJ 14, at para. 16 (CanLII), the victim described the confusion, shame and emotional harm that accompanied the luring and extortion she faced. In *Rayo*, the victim experienced feelings of guilt, shame and anxiety, and reported that

[TRANSLATION] “she had lost confidence in herself and that the events had led her to self-mutilation and suicidal thoughts” (para. 174). In *R. v. Roy*, 2020 QCCQ 4546, the victim had difficulty sleeping for several weeks following the offence, lost confidence in herself and still struggled to trust others (para. 51 (CanLII)). In *R.S.F.*, although the victim was not physically touched, “her mind was manipulated”, she had “nightmares about being hurt again” and she suffered from “overwhelming and significant anxiety, depression and post-traumatic disorder” (paras. 34-35).

[41] *Friesen* recognized that sexual violence against children also affects other people in the victims’ lives (para. 76). The Court highlighted the harmful ripple effects on families, community and society (para. 63). Child luring can similarly destroy trust in friends, families and social institutions and cause children to shut parents out of their lives. In *Rayo*, the luring prompted a severe conflict between the child and her mother (para. 174). In *Rafiq*, the luring led the victim to close herself off from her family (paras. 40-41).

[42] Identifying the distinct harms of luring in each case may prove more or less difficult, depending on the circumstances. In cases where luring is the standalone offence, identifying the distinct harm may be more straightforward. However, in cases where the luring actually manifests in the commission of a secondary offence, identifying the distinct harm of luring may be more challenging.

[43] One way to identify the distinct harms at play is for courts to differentiate between contact-driven luring, where the offender’s goal is to facilitate in-person

sexual abuse, and luring that leads to sexual abuse occurring entirely online (see *R. v. M.B.*, 2020 ONSC 7605, at para. 78 (CanLII), for an example in relation to child pornography). In the latter context, the online medium is the primary setting where the abuse takes place and the offender may have no intention to take the abuse offline. In the context of contact-driven luring, the online environment can, but need not, play a significant role in the sexual abuse. The technology may sometimes function solely as a medium to gain physical access to a victim. Where the luring is contact-driven, sentencing judges should consider whether the online communication caused psychological harm that stands separate and apart from the harm of any secondary offence that may have been committed. Victims of contact sexual abuse can be sexually exploited and psychologically manipulated online by their offenders both before and after they were abused offline. It is an error to presume that luring cannot engender independent harm.

[44] Other times, the aim of luring will be to commit a designated secondary offence set out in s. 172.1(1) that occurs entirely online. This might encompass a range of behaviours including sexual chat, the sharing of sexualized photos or videos, or viewing or performing sexual acts by video, all of which may be encapsulated within the secondary offences of invitation to sexual touching or the child pornography offences (J. A. Kloess et al., “A Qualitative Analysis of Offenders’ Modus Operandi in Sexually Exploitative Interactions With Children Online” (2017), 29 *Sex. Abuse* 563, at pp. 584-87). In such circumstances, the offender uses technology to build a relationship, assert control and psychologically manipulate young persons, and may

also use that same technology to then carry out sexual acts. In such circumstances, it might be difficult to decipher whether the luring caused distinct psychological harm, as the harm caused by the luring might resemble the harm caused by the underlying offence which also occurred online.

[45] Contact-driven luring is not necessarily more or less harmful than luring that leads to sexual abuse that occurs entirely online. The severity of the harm caused by the online communication will depend on the individual offender and his or her offending goals, the individual characteristics of the victim, and the unique dynamic between the offender and the victim.

(3) Parliament Has Mandated That Sentences for Luring Must Increase

[46] *Friesen* urges courts to consider Parliament's legislative initiatives in sentencing offenders for sexual offences against children (para. 107). Parliament has consistently raised these sentences to reflect a growing awareness of their gravity, and to indicate the serious emotional and psychological harms they cause for victims (paras. 56, 98 and 101-5). This same increasingly punitive trend applies to the sentencing regime for luring offences:

- In 2002, when enacting the offence of luring, Parliament provided for a maximum term of five years' imprisonment for luring proceeding by indictment (*Criminal Law Amendment Act, 2001*, s. 8). No maximum penalty was set for luring proceeding summarily.

- In 2005, Parliament enacted s. 718.01 of the *Criminal Code* which provides that the objectives of denunciation and deterrence take priority in cases of the abuse of a person under 18 (*An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 24; *Criminal Code*, s. 718.01).
- In 2007, the maximum sentence for luring proceeding by indictment was increased to 10 years' imprisonment and a maximum sentence of 18 months' imprisonment was introduced for luring proceeding summarily (*An Act to amend the Criminal Code (luring a child)*, S.C. 2007, c. 20, s. 1).
- In 2012, mandatory minimum sentences for child luring were introduced (*Safe Streets and Communities Act*, s. 22). As a result, child luring proceeding by indictment carried a mandatory minimum punishment of one year's imprisonment, and luring proceeding summarily carried a mandatory minimum punishment of 90 days' imprisonment.
- In 2015, with the *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23, s. 11, Parliament elevated the maximum sentence for luring proceeding by indictment to 14 years' imprisonment. The maximum sentence for luring proceeding summarily was increased from 18 months to 2 years' less a day imprisonment and the mandatory minimum punishment was increased to 6 months' imprisonment.

[47] These legislative changes should be regarded as a sign of Parliament's view of the offence's gravity (*Rayo*, at para. 125). They make clear that proportionate sentencing that responds to the gravity of the luring offence and the degree of responsibility of the offender will often require substantial sentences of imprisonment. As a result, courts should depart from dated precedents that do not reflect society's current awareness of the impact of sexual violence on children in imposing a fit sentence (*Friesen*, at para. 110).

(4) Summary

[48] *Friesen's* analytical approach necessitates an understanding of the inherent wrongfulness and distinct harms of luring and Parliament's sentencing goals. Understanding the wrongfulness and harmfulness of the luring offence is integral to properly assessing the gravity of the offence and the degree of responsibility of the offender, as well as to avoiding stereotypical reasoning and the misidentification of aggravating and mitigating factors (para. 50). I use this guidance to inform Mr. Bertrand Marchand's fit sentence and as the foundation for the constitutional analysis under s. 12.

D. *The Sentencing Judge Erred in Assigning a Five-Month Concurrent Sentence for the Luring Offence*

[49] The sentencing judge properly considered denunciation and deterrence and recognized that the total sentence must be proportionate to the gravity of the offences

and to the respondent's degree of responsibility. When addressing the sentence for the sexual interference, which is not on appeal before this Court, she acknowledged that this was a [TRANSLATION] "situation of sexual exploitation" (para. 60) and a "relationship based on manipulation to satisfy sexual needs with a still-developing adolescent", which would leave "scars" (para. 59). The vulnerability of the young victim, who was under the Director of Youth Protection's care, was also recognized regarding both the sexual interference and luring offences (paras. 60 and 70).

[50] According to *Lacasse*, sentencing judges are afforded broad discretionary powers in crafting a fit sentence (para. 39). Appellate intervention is justified only if a sentence is demonstrably unfit or if the judge committed an error in principle that impacted the sentence imposed (para. 44). The sentencing judge committed errors in principle that impacted the assigned sentence of five months' imprisonment that she ordered be served concurrently to the sexual interference sentence. Specifically, she erred by (1) minimizing the harm caused to the victim by failing to recognize the grooming that did occur; (2) misconstruing the offender's actions; and (3) assigning a concurrent sentence for the luring offence. These errors in principle warranted appellate intervention that the majority of the Court of Appeal below failed to undertake. I would thus substitute the 5-month sentence imposed by the sentencing judge with the 12-month sentence sought by the Crown.

(1) The Sentencing Judge Failed to Recognize the Grooming That Occurred

[51] Evidence of grooming may be present where child luring is made out. Grooming is a process which allows the offender to forge a close relationship with a victim to gain trust, compliance and secrecy for the purpose of eventually engaging in sexualization and abuse (*Rayo*, at para. 149). The jurisprudence has yet to identify a universal definition of grooming. Understandably, this is in large part due to the difficulties in determining where the process begins and ends, as well as the variety of behaviours that may be involved depending on the offender, the victim, and the context. Indeed, grooming can involve, but is not limited to “rapport building, incentivization, disinhibition, and security management” (I. A. Elliott, “A Self-Regulation Model of Sexual Grooming” (2017), 18 *Trauma, Violence, & Abuse* 83, at p. 88). It is “a slow and gradual process of active engagement and a desensitization of the child’s inhibitions — with an increasing gain in power and control over the young person” (*Rayo*, at para. 139, quoting M. Ospina, C. Harstall and L. Dennett, *Sexual Exploitation of Children and Youth Over the Internet: A Rapid Review of the Scientific Literature* (2010), at p. 7).

[52] Grooming often goes hand in hand with the common features of luring, namely a “prolonged, deliberate and careful cultivation of a young person with a view to engendering trust and intimacy, all designed to promote sexual conduct between the two parties” (*Paradee*, at para. 20). While often a preparatory process, grooming need not culminate in a sexual act to be harmful. Grooming allows an offender to gain power and control over the young person, which in turn may lead to distinct psychological harm. This harm exemplifies the vulnerability and exploitation of children facilitated

by the internet that Parliament sought to protect against in enacting the luring offence (*Rayo*, at paras. 138-39; *Reynard*, at paras. 19-20; *Alicandro*, at para. 36; *Legare*, at para. 25).

[53] The identification of grooming should be left to the fact-finder in each case. In assessing whether grooming is present, judges should focus on the character, content, and consequences of the messages, as well as whether the communication resulted in psychological manipulation of the child.

[54] The text of s. 172.1 is clear that grooming is not a constituent element of the luring offence. While its presence may be aggravating at sentencing, its absence is not mitigating.

[55] In this case, the sentencing judge failed to appreciate the harms that grooming generated for this young victim — in fact, the sentencing judge did not recognize the victim had been groomed at all. By characterizing the luring as a contact-driven means to an end, the sentencing judge failed to account for the psychological manipulation that arose from the online communication alone. With respect, she failed to disentangle the harm caused by the online communication from the harm caused by the sexual interference. Instead of viewing grooming as a continuous process that serves to renew and strengthen an exploitative relationship, she discounted its presence because prior sexual acts had occurred. Irrespective of the physical sexual acts that preceded and followed the communication, Mr. Bertrand Marchand's tactics and

actions demonstrate controlling manipulation using the internet, which I characterize as grooming. This grooming should have served as an aggravating factor on sentencing.

[56] The messages exchanged by Mr. Bertrand Marchand and the victim confirmed the power imbalance between this adult and this child. During the relevant period, the respondent requested to meet the victim upwards of 18 times in order to have sexual intercourse (sentencing reasons, at para. 68). The respondent persisted with these requests until he succeeded in using her to serve his own sexual purposes. These meetings impacted the rules and conditions the victim was subject to at the rehabilitation centre she resided in at the time, and put her in danger. The respondent also suggested on several occasions that she run away from the centre, even after the victim voiced fears of getting caught by her supervisors (A.R., vol. II, at pp. 109, 115 and 137).

[57] The messages were often sexually explicit. Several times throughout their conversations, Mr. Bertrand Marchand impatiently asked her to send compromising photos over Snapchat (A.R., vol. II, at p. 110). He commented on her body, calling her sexy, saying [TRANSLATION] “ur really a woman”, and noting that she had gained weight and looked like more of a woman (p. 117). He stated [TRANSLATION] “ur gonna feel horny later” (p. 129) in the hopes of receiving an explicit photo via Snapchat. He said he was “joking” about screenshotting these explicit photos and saving them to his phone (p. 124).

[58] As recognized by the sentencing judge, the victim understood and expressed that the respondent was only staying in contact with her in order to have sexual intercourse (p. 80). In certain passages, the victim told the respondent that she felt used and exploited. She stated [TRANSLATION] “I’m fed up and don’t want to be seen as a slut”, and asked him to respect her (p. 127). She expressed being [TRANSLATION] “in need of love”, to which Mr. Bertrand Marchand responded “haha or in need of sex?” (p. 131).

[59] Mr. Bertrand Marchand also strategically expressed disappointment in the victim to exert control over her actions. He told her that she had lost his respect and conveyed frustration when she did not promptly respond to his messages. He told her she was letting him down when she did not send him explicit photos on demand (A.R. vol. II, at p. 115).

[60] Simultaneously, Mr. Bertrand Marchand gradually gained the victim’s trust by showing concern for her, buying her gifts, and making promises. At times he took on the role of a mentor by telling her not to end up in trouble, or asking her how school was going. He expressed that he did not [TRANSLATION] “want to be in shit because you run away to our place” (p. 155). He also promised to purchase her alcohol, and cajoled, enticed and praised her in an effort to gain sexual advantage.

[61] The record reveals that Mr. Bertrand Marchand did not respect the victim’s stated boundaries. In the final messages exchanged, where [TRANSLATION] “the teenager stated clearly that she no longer wanted to continue their relationship”, he

insisted saying that she was [TRANSLATION] “too much of a woman” for them to stop talking (sentencing reasons, at para. 48; see also A.R., vol. II, at p. 161). Rather than respecting her request to end contact, he made her question her decision, warning her that because he made a lot of money, she would never be able to find someone who could spoil her like him (A.R., vol. II, at p. 161).

[62] The messages demonstrate that the respondent groomed the victim with the aim to control and influence this child toward a sexual purpose. He used his relative seniority over the victim to manipulate her and capitalized on the power imbalance between them. He pressured her, berated her and imbued their communications with sexual undertones and overtones. He ignored her stated boundaries and oscillated between endearment and frustration to obtain the sexual contact that he wanted. The offender did all of this via online messaging platforms — the only medium by which the victim was able to communicate with the outside world. This behaviour is not only grooming, but is precisely what Parliament sought to prevent by introducing the luring provisions.

[63] The sentencing judge erred by failing to recognize the grooming present here, which should have served as an aggravating factor on sentencing.

(2) The Sentencing Judge Misconstrued the Offender’s Actions

[64] Taking a critical look at the language used to describe sexual violence experienced by children is essential to adequately reflect the wrongfulness and the

harmfulness of these offences. In *Friesen*, the Court warned against the use of misleading language that either euphemizes or eroticizes sexual violence because it risks trivializing that violence, normalizing conduct that is meant to be condemned, and it removes responsibility from the offender (paras. 147 and 151). Imprecise language can also indicate the presence of biases that may impermissibly affect the court's reasoning (S. Zaccour and M. Lessard, "La culture du viol dans le discours juridique: soigner ses mots pour combattre les violences sexuelles" (2021), 33 *C.J.W.L.* 175, at p. 203). Courts should avoid language that may re-victimize victims "by disguising and obscuring the violence, pain, and trauma that [they] experienced" (*Friesen*, at para. 147).

[65] In the instant case, the sentencing judge stated that this was not a "classic" case of luring, but rather an attempt to repeat the "sexual escapades" that the victim had already "consented" to three times. The judge explained that the impugned communications occurred online not because of the anonymity that social media affords, but because this platform was commonly used by persons of Mr. Bertrand Marchand's generation.

[66] While it is true that the respondent did not anonymously approach a child online that he had never met before, he did use telecommunication platforms to manipulate a child for his own sexual ends. Luring can be done anonymously, but it is inaccurate and unhelpful to characterize this as its "classic" form (S. Paquette and F. Fortin, "Les traces numériques laissées par les cyberdélinquants sexuels: identités

virtuelles, mensonges et protection de l’anonymat” (2021), 74 *R.I.C.P.T.S.* 387, at p. 401; see also *Rayo*; *R. v. Miller*, 2016 SKCA 32, 476 Sask. R. 150, at para. 23). Mr. Bertrand Marchand’s choice to contact the victim online was not merely a “generational choice”. Because the victim lived in a rehabilitation centre, online communication was the only way Mr. Bertrand Marchand could access the victim and build a relationship with her in order to repeat the acts constituting sexual interference. I agree with the dissenting judge in the court below that [TRANSLATION] “the respondent . . . chose to use the means of telecommunication available to him and the victim to multiply their encounters to ensure his control and maintain his domination over her” (C.A. reasons, at para. 36). The sentencing judge treated the absence of anonymity as reducing the seriousness of the offence (*Rayo*, at para. 88) and misconstrued the use of social media as merely a generational preference. Both of these elements erroneously served as mitigating factors on sentencing.

[67] By employing the term [TRANSLATION] “sexual escapade” to describe Mr. Bertrand Marchand’s illegal sexual interference with a minor (paras. 38, 50-51, 64 and 68), the sentencing judge minimized the harm done to the child. Such a term evokes pleasure and excitement, and privileges the perspective of the adult. This is akin to using terms such as “fondling” and [TRANSLATION] “caressing”, which signal that the conduct is inherently less blameworthy or harmful than other forms of violence (*Friesen*, at para. 144, citing *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269, at para. 150, and *Caron Barrette v. R.*, 2018 QCCA 516, at para. 93 (CanLII)). This language “undermines Parliament’s objective of communicating that the use of

children as sexual objects for the gratification of adults is wrongful” (*Friesen*, at para. 147).

[68] The sentencing judge stated on numerous occasions that the victim had already “consented” to the sexual intercourse. Clearly, given the victim’s age, any purported “consent” to sexual activity in these circumstances was legally impossible. The presence of prior acts making out the offence of sexual interference should not mitigate the wrongfulness of the conduct or minimize the harm it generates. That this minor was subject to three prior instances of illegal sexual intercourse establishes a pattern of abuse, and not a reason for it. While the sentencing judge acknowledged that consent could not play a role in the *sexual interference* offence, she did not make this same distinction for the luring offence. The use of language that suggests consent in situations where consent is legally impossible is to be avoided. Analogizing a child’s psychological manipulated actions to consent is a legal error (*Friesen*, at paras. 148-50).

[69] A review of the sentencing judge’s language reveals that her framing of the illegal sexual encounters as “escapades” and her wrongful characterization of the victim’s behaviour as consent minimized Mr. Bertrand Marchand’s actions. This framing caused her to unduly minimize the wrongfulness and harms of the offence by factoring in the extent to which the victim “participated” in the violence — which was a separate error of law (*Friesen*, at para. 150).

E. *A 12-Month Sentence Is Appropriate*

[70] These errors mean this Court is now tasked with setting a fit and proportionate sentence for Mr. Bertrand Marchand. I agree with the Crown that given the particular circumstances of the luring in this case, there was no justification for departing from the existing sentencing range of 12 to 24 months for luring cases proceeding by indictment (*Morrison*, at para. 177, citing *Jarvis*, at para. 31; A.F., at para. 75).

(1) Significant Factors to Determine a Fit Sentence

[71] In addition to determining the gravity of the offence, determining the moral blameworthiness of the offender is key to setting a proportionate sentence. This requires identifying both mitigating and aggravating factors. Here, in order to examine Mr. Bertrand Marchand's blameworthiness and set a proportionate sentence, I provide a non-exhaustive list of aggravating and mitigating factors that have particular relevance in the context of luring.

(a) *Mitigating Factors*

[72] Sentencing judges must consider the mitigating factors that arise on the facts of the particular case before them. Mitigating factors that commonly appear in luring cases include whether the offender pleaded guilty (see, e.g., *Misay*, at para. 141; *Melrose*, at para. 264; *Wall*, at para. 75; *R. v. Ditoro*, 2021 ONCJ 540, at para. 43 (CanLII); *R. v. Gould*, 2022 ONCJ 187; *R. v. Cooper*, 2023 ONSC 875, at para. 17 (CanLII); *R. v. Clarke*, 2021 NLCA 8, at para. 53 (CanLII); *R.S.F.*, at para. 103; *R. v.*

Aeichele, 2023 BCSC 253, at para. 61 (CanLII); *R. v. Wolff*, 2020 BCPC 174, at para. 64 (CanLII)), whether the offender has expressed genuine remorse or gained insight into the offence (see, e.g., *Directeur des poursuites criminelles et pénales v. St-Amour*, 2021 QCCQ 6855, at para. 43 (CanLII); *Wall*, at para. 75; *Ditoro*, at para. 59; *Misay*, at para. 150; *Gould; R. v. Rice*, 2022 ABKB 773, at para. 48 (CanLII); *Clarke*, at para. 53; *R.S.F.*, at para. 105; *Wolff*, at para. 67), and whether the offender has undertaken rehabilitative steps such as counselling or treatment (see, e.g., *R.S.F.*, at para. 103; *R. v. Wickramasinghe*, 2022 ONCJ 331, at para. 25 (CanLII); *Gould; R. v. Rasiah*, 2021 ONCJ 584, at para. 42 (CanLII)). Here, in her analysis of the sentence for the sexual interference count, the sentencing judge considered the pre-sentence report and rightly accounted for Mr. Bertrand Marchand's guilty plea, lack of prior convictions, honesty and cooperation throughout the sentencing process, factors which were also relevant to the luring offence.

[73] The personal circumstances of the offender can also have a mitigating effect on blameworthiness (*Friesen*, at paras. 91-92). In the context of determining the appropriate sentence overall, the sentencing judge in this case accounted for Mr. Bertrand Marchand's age at the time of the events, his stable family life, and the fact that he had maintained stable employment for around three years. Mr. Bertrand Marchand overcame a substance use disorder during adolescence. At the time, this caused him health problems and panic attacks (sentencing reasons, at para. 22). An offender might have a mental disability or substance use disorder that imposes serious cognitive limitations, such that their moral culpability is reduced (*Friesen*, at para. 91;

see, e.g., *Hood*, at para. 180; *Melrose*, at paras. 223-35; *R. v. Osadchuk*, 2020 QCCQ 2166, at paras. 51-55 (CanLII); *R. v. Deren*, 2021 ABPC 84, at paras. 44 and 51 (CanLII); *R. v. Sinclair*, 2022 MBPC 40, at paras. 15 and 67 (CanLII); *Wolff*, at para. 65). However, this factor is not as mitigating in Mr. Bertrand Marchand's circumstances as his substance use did not overlap with the material time period (unlike *Sinclair*, at para. 67; *Wolff*, at para. 65).

(b) *Aggravating Factors*

(i) Grooming

[74] As articulated above, the sentencing judge erred in principle by failing to account for the fact that the offender's actions caused the victim distinct psychological harm. Mr. Bertrand Marchand's manipulation and grooming are both aggravating factors that increase his moral blameworthiness.

[75] Here, no formal victim impact statement was adduced at sentencing. Nevertheless, even where evidence of actual harm to the victim is not admitted, harm can still be inferred. This Court instructed that "sexual violence against children inherently has the potential to cause several recognized forms of harm. . . . [T]he potential that these forms of harm will materialize is always present whenever there is physical interference of a sexual nature with a child and can be present even in sexual offences against children that do not require or involve physical interference" (*Friesen*,

at para. 79). The potential for reasonably foreseeable harm must be considered on sentencing even where the luring results in no actual harm (para. 84).

[76] Where there is no direct evidence of actual harm to the victim, “[c]ourts may be able to find actual harm based on the numerous factual circumstances that can cause additional harm and constitute aggravating factors” (para. 86). In other words, sentencing judges can infer the likelihood of actual harm where there are aggravating factors such as grooming (see, e.g., *R. v. Pentecost*, 2020 NSSC 277, at paras. 50-54 (CanLII)).

(ii) Character of the Communication

[77] The character of the communication is relevant to the blameworthiness of the conduct. In this appeal, the period for the count of luring on the indictment spans nearly seven months. During this time, hundreds of messages were exchanged between the respondent and the victim. The duration and frequency of the communications are important to the extent that they may generate cumulative or more severe harms, and increase the gravity of the offence and the moral blameworthiness of the offender. Because repeated and prolonged acts of sexual violence increase the long-term harm suffered by the victim (*Friesen*, at para. 131), sending a large volume of messages, or sending messages in a persistent and unrelenting way, is aggravating (*R. v. Collier*, 2021 ONSC 6827, at para. 75 (CanLII); *R. v. Kavanagh*, 2023 ONSC 283, at para. 84 (CanLII); *R. v. Moolla*, 2021 ONSC 3702, at para. 22 (CanLII); *R. v. E.F.*, 2021 ABQB 272; *R. v. Battieste*, 2022 ONCJ 573, at para. 45 (CanLII)). In addition, while a shorter

duration of communication is not a mitigating factor, maintaining online communications for a long period of time is aggravating (*R. v. Faille*, 2021 QCCQ 4945, at paras. 68-70 (CanLII)).

[78] The substance of the communication is relevant when sentencing. Here, Mr. Bertrand Marchand often sent sexually explicit and objectifying messages to the victim. Graphic sexual content is clearly aggravating, but so is communication where the offender manipulates through language about love and affection (*Wolff*; *R. v. Saberi*, 2021 ONCJ 345, 493 C.R.R. (2d) 121; *R. v. Boucher*, 2020 ABCA 208). It is also aggravating for the offender to rely on trickery, lies or manipulation to lure the victim (*Collier*, at para. 77).

[79] Encouraging a child to share images of themselves or sending explicit images to the child also heightens blameworthiness and may serve as an aggravating factor on sentencing with respect to the luring offence (*Collier*; *Kavanagh*; *R. v. Kalliraq*, 2022 NUCA 6; *R. v. Razon*, 2021 ONCJ 616; *Deren*). Mr. Bertrand Marchand encouraged the victim on numerous occasions to send explicit photos of herself through Snapchat, which he mentioned saving to his phone (A.R., vol. II, at p. 124). The duration and frequency of the communications, along with the sexually explicit nature of the messages and the repeated requests for explicit photos, are all aggravating factors in this case (*Collier*; *Kavanagh*; *Kalliraq*; *Razon*; *Deren*).

(iii) Deceit

[80] Deceit can present itself in many forms and is aggravating. Where an offender relies on anonymity, for example by using a false name, identity, or age, then the conduct is more blameworthy (*Pentecost*; *R. v. Coban*, 2022 BCSC 1810; *Ditoro*; *R. v. Bains*, 2021 ABPC 20; *Cooper*; *Collier*; *Montour v. R.*, 2020 QCCA 1648). However, not every offender operates under the shield of anonymity. In this case, Mr. Bertrand Marchand met the victim in person and used his real identity when adding her on Facebook. Depending on the circumstances, a vulnerable child's trust may be won by either lying about one's identity or by exploiting a pre-existing relationship (*Rayo*, at paras. 92-93).

[81] The communication itself might also include deceitful tactics. In some cases, an offender may instruct the victim to erase the communication to conceal the luring, or to refrain from sharing the messages with parents or family members (*Saberi*; *R. v. LaFrance*, 2022 ABCA 351). An offender may also tell the victim to dress more maturely when they meet in person (*Saberi*). It is further aggravating for an offender to intentionally choose a platform that erases records of communication in order to avoid detection (see *J.R.*), or to suggest a more secure platform after learning of the child's age (*Rasihah*). In this case, Mr. Bertrand Marchand asked the victim to send him explicit photos on Snapchat, a platform that erases records of communication. However, photos were also exchanged throughout their communication on Facebook. This suggests that the intention to avoid detection is not present here.

(iv) Abuse of a Position or Relationship of Trust

[82] The jurisprudence provides several examples of traditional positions of authority that may be exploited, including that of a parent (see, e.g., *J.R.*), teacher (see, e.g., *Pentecost; Faille; R. v. Jissink*, 2021 ABQB 102, 482 C.R.R. (2d) 167), or family friend (see, e.g., *Rayo; R. v. Lemay*, 2020 ABCA 365, 14 Alta. L.R. (7th) 45; *Boucher*). However, positions of trust fall on a spectrum, and a relationship of trust of any kind may facilitate the commission of the offence (*Rayo*, at paras. 87 and 96; *Friesen*, at para. 125). Prior relationships can be leveraged to provide an entry, form a basis of trust, build confidence, and can make it easier to manipulate the victim — often because the offender knows more about the victim, including any additional vulnerabilities, like the victim’s family situation. In cases where an offender uses a pre-existing relationship in order to exploit pre-existing trust, a breach of this trust is “likely to increase the harm to the victim and thus the gravity of the offence” (*Friesen*, at para. 126).

[83] In many cases of luring the offender is intentionally attempting to build a relationship of trust, move an existing trust relationship onto sexual terrain, or build secrecy. The eventual breach of trust may produce feelings of fear and shame, discourage reporting and undermine relationships. When an offender exploits his role as the confidante or friend in order to gain a victim’s trust for the purposes of facilitating sexual contact, this increases his degree of responsibility (*R.S.F.; Rayo*, at paras. 87 and 96).

[84] Mr. Bertrand Marchand and the victim met in person through mutual friends, then communicated online. He had illegal intercourse with her three times prior

to engaging in the online communications that led to the luring charge. The luring count, therefore, does not encompass the three instances of sexual interference that preceded it. As the appellants remarked in written submissions, the fact that the underlying offence occurred three times before the start of the luring does not diminish the seriousness of the subsequent communications (A.F., at paras. 34-48). This pre-existing relationship opened the door to the Facebook communications and allowed Mr. Bertrand Marchand to access the victim. The respondent exploited the pre-existing trust he had established with the victim when they first met.

(v) Age of the Victim

[85] The age of the child victim may also be an aggravating factor. Per s. 718.2(a)(ii.1) of the *Criminal Code*, abuse of a person under 18 years is a statutorily aggravating circumstance. While luring will always involve a child, practically speaking it requires a child of an age who can access and use telecommunications. As such, very young children and infants are rarely victims of this offence. Instead, luring will often involve adolescent victims. Sentencing judges should heed the caution in *Friesen* that courts must “be particularly careful to impose proportionate sentences in cases where the victim is an adolescent” because disproportionately low sentences have historically been imposed in these cases (para. 136).

[86] Luring involves an inherent power imbalance between the adult using technology and the unsupervised child or adolescent receiving their messages. In *Friesen*, this Court discussed the pronounced power imbalance between adults and

children who are “often helpless without the protection and care of their parents” (para. 134). Though the victim in this case was an adolescent and not a young child, she was under the care of the Director of Youth Protection when she was targeted by Mr. Bertrand Marchand, making her exceptionally vulnerable in the circumstances.

[87] Further, a wide gap in age between the offender and victim increases blameworthiness (see, e.g., *Misay*, at para. 61; *Faille*, at para. 74; *Jissink*, at para. 52; *R. v. Aguilar*, 2021 ONCJ 87, at para. 21 (CanLII), aff’d 2022 ONCA 353, at para. 14 (CanLII)). Here, Mr. Bertrand Marchand is nine years older than the victim, who was in her early teenage years at the start of the indictable period. He was aware of her age from the start and mentioned her youth several times. The significant age gap and the victim’s severe vulnerability are both aggravating factors.

(c) *A Fit Sentence*

[88] I accept the appellants’ submission that Parliament’s legislative initiatives regarding sexual offences against children, the aggravating and mitigating factors articulated above, and the distinct harm caused by the online communication justify a sentence of 12 months’ imprisonment for Mr. Bertrand Marchand.

(2) Concurrent Versus Consecutive Sentences

[89] I now turn to the sentencing judge’s order that the sentences for the offences of sexual interference and luring be served concurrently.

[90] Because of its constituent elements, luring will often arise with other offences. This raises methodological considerations about how to approach sentencing for multiple offences and when sentences should run concurrently or consecutively.

[91] The sentencing judge first determined the just and appropriate sentence for each offence individually. Next, she considered whether the sentences ought to be consecutive or concurrent. Only after doing this did she consider the principle of totality in s. 718.2(a), which ensures that “the cumulative sentence rendered does not exceed the overall culpability of the offender” (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 42; see also *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, at para. 84, and *Desjardins v. R.*, 2015 QCCA 1774, at paras. 37-42 (CanLII), which have endorsed a similar approach).

[92] I agree with the sentencing judge’s approach in this case and believe it has benefits over the alternative manner of simply setting a global amount for multiple offences. This sequential approach ensures a separate consideration of the fit and appropriate punishment of each offence. Given the separate objectives and distinct criteria for the luring offence, it was appropriate to examine each offence individually [TRANSLATION] “in order to understand properly the weight this offence contributes to the offender’s moral blameworthiness” (*Rayo*, at para. 55).

[93] Articulating individual sentences for each offence provides needed clarity and is of great assistance when one of the challenged punishments are varied on appeal or declared to be unconstitutional. Setting an individual sentence for each offence

provides transparency and allows a judge to weigh the seriousness of each offence. Clearly identifying individual sentences may also prove to be of great assistance in any subsequent sentencing proceedings should an offender *re-offend* — for example, by providing sentencing judges with a starting point when applying the “jump principle” to repeat convictions for the same offences (*R. v. Borde* (2003), 63 O.R. (3d) 417 (C.A.), at para. 39).

[94] The sentencing judge determined that Mr. Bertrand Marchand’s sentences for sexual interference and luring should be served concurrently because the offences were closely connected. While deference is owed to a judge’s decision on whether to impose a consecutive or concurrent sentence (*R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 46), respectfully, the sentencing judge erred by imposing a concurrent sentence in this case. To properly account for the distinct legal interests that the luring offence protects, the sentences should have been consecutive.

[95] Parliament has removed judicial discretion and has dictated that sentences must run consecutively for certain offences, like child pornography where the offender also commits another sexual offence against that child, or where there are sexual offences other than child pornography committed by the same offender against several children (*Criminal Code*, s. 718.3(7)). Generally speaking, “offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences” (*Friesen*, at para. 155; see also *Criminal Code*,

s. 718.3(4)(b)(i)). Determining whether sentences should be consecutive or concurrent is a fact-specific inquiry to be undertaken in the context of each case (C. C. Ruby, *Sentencing* (10th ed. 2020), at §14.13).

[96] Luring is legislatively linked to listed secondary offences: an offender must communicate for the purpose of facilitating the commission of one such offence. While there will be cases where luring stands alone, it often accompanies the actual commission of a listed secondary offence. But the luring that preceded or produced the offence is in no way subsumed or supplanted within the secondary offence. This is because the offence of luring protects a distinct social interest and causes distinct harms compared to the secondary offences (*Rayo*, at paras. 130 and 134).

[97] Offences constituting “invasions of different legally protected interests” can be sentenced consecutively, even if they form part of the same criminal transaction (*Rayo*, at para. 136, quoting *R. v. Gummer* (1983), 38 C.R. (3d) 46 (Ont. C.A), at p. 49; *R. v. Gillis*, 2009 ONCA 312, 248 O.A.C. 1, at para. 9; *R. v. Morton*, 2021 ABCA 29, at paras. 32-33 (CanLII)). Parliament intentionally targeted conduct that precedes the commission of the enumerated sexual offences and seeks to protect children from the possibility of sexual exploitation facilitated by the internet (*Rayo*, at paras. 138-39; *Reynard*, at paras. 19-20; *Alicandro*, at para. 36; *Legare*, at para. 25). As set out above, luring can cause distinct harms as a result of psychological manipulation. As such, in most cases luring will attract a consecutive sentence (*Rayo*, at paras. 133-43; *R. v. McLean*, 2016 SKCA 93, 484 Sask. R. 137, at paras. 50-53; *Miller*, at paras. 22-23).

As noted in *Rayo*, the distinct offence of luring may seem to go unpunished, at least in part, where the luring sentence runs concurrently to the sentences for the related offences (para. 152).

[98] This is not to say that luring must always be sentenced consecutively. Unless so mandated by s. 718.3(7), sentencing judges retain discretion on this point. However, in exercising their discretion, judges must remain cognizant of the fact that the offence of luring constitutes an invasion of a different legally protected interest. The judge is obliged to explain why the sentence is to be served concurrently with the penalties imposed for other infractions. The reason for imposing a concurrent sentence must be provided. I also note that judges must be mindful not to double count: where a judge orders that a sentence for luring be served consecutively to any sentence for a secondary offence, the secondary offence cannot act as an aggravating factor in determining the luring sentence.

(3) Totality

[99] The effect of the totality principle is to require a judge to ensure that the series of sentences are, in aggregate, “just and appropriate” (see *M. (C.A.)*, at para. 42; *Criminal Code*, s. 718.2(c)). This involves taking “one last look at the combined sentence” to assess whether it is “unduly long or harsh, in the sense that it is disproportionate to the gravity of the offence and the degree of responsibility of the offender” (*Hutchings*, at paras. 42 and 84; *Laguerre v. R.*, 2021 QCCA 1537, at para. 43 (CanLII); *M. (C.A.)*, at para. 42). If the principle of totality is offended, the

sentences can be adjusted by making some concurrent, or if this does not achieve a just and appropriate sentence, by reducing the length of one or more sentences (*Desjardins*, at para. 34).

[100] As articulated above, the sentencing judge in this case failed to consider that the distinct legal interest that the luring offence protects was present in the case at bar. This caused her to conflate the sentence for luring with the sentence for the secondary offence. As such, I conclude that the 12-month luring sentence ought to be served consecutively with the 10-month sentence for sexual interference.

[101] Applying the totality principle, I find that a 22-month sentence is just in light of the circumstances of the case, Mr. Bertrand Marchand's personal circumstances and his moral blameworthiness.

[102] Mr. Bertrand Marchand has already served the 10-month sentence for sexual interference in full and was paroled in July 2020. Given the time that has elapsed and the fact that the appellants are not seeking further punishment, it would not serve the ends of justice to re-incarcerate Mr. Bertrand Marchand. Accordingly, I order a permanent stay of execution of the modified sentence (see *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 132; *R. v. R.A.R.*, 2000 SCC 8, [2000] 1 S.C.R. 163, at para. 35; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 65).

IV. The Mandatory Minimum Sentences in Section 172.1(2) of the *Criminal Code* Violate Section 12 of the *Charter*

[103] These companion appeals impugn the constitutionality of both the summary and indictable mandatory minimum sentences attached to the hybrid luring offence pursuant to s. 12 of the *Charter*. In the courts below, Mr. Bertrand Marchand successfully challenged the one-year mandatory minimum for the indictable offence and H.V. successfully challenged the six-month mandatory minimum for the summary conviction offence. As respondents before this Court, they ask that those decisions be upheld. These reasons take a holistic view of the luring provision and its penalties to best assess whether the mandatory minimum sentences pass constitutional muster. This is the first time the Court will answer the constitutional questions arising from these mandatory minimums: while the majority in *Morrison* declined to rule on the constitutionality of s. 172.1(2)(a), Justice Karakatsanis found it offended s. 12 and was not saved by s. 1.

[104] Recently, this Court reaffirmed and clarified the framework for constitutional challenges to mandatory minimum sentences under s. 12. Whether the mandatory minimum sentences in s. 172.1(2)(a) and (b) are unconstitutional requires a two-stage inquiry that involves a contextual and comparative analysis (*R. v. Hills*, 2023 SCC 2, at para. 40; *R. v. Bissonnette*, 2022 SCC 23, at para. 62). First, a court must set a fit and proportionate sentence for the individual offenders before the court and possibly other reasonably foreseeable offenders (*Hills*, at para. 40; see also *Bissonnette*, at para. 63; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 77). Second, a court must determine whether the mandatory minimum requires imposing a sentence that is grossly disproportionate to the otherwise fit and proportionate sentence (*Hills*, at

para. 40; *Bissonnette*, at para. 63; *Nur*, at para. 46; *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072). This involves consideration of the scope and reach of the offence, the effects of the penalty on the individual or reasonably foreseeable offender, and the penalty and its objectives (*Hills*, at para. 122).

[105] The *Hills* framework was not available to the courts below in either Mr. Bertrand Marchand's or H.V.'s cases when those courts assessed the mandatory minimum sentences. Nevertheless all decided that the mandatory minimums at issue infringed s. 12. Their conclusions are consistent with other courts across the country (see, e.g., *Hood*; *Melrose*; *R. v. Faroughi*, 2020 ONSC 780; *R. v. Koenig*, 2019 BCPC 83; *Roy*; *Deren*; *R. v. Ward*, 2019 NSPC 72; *R. v. Fawcett*, 2019 BCPC 125).

[106] The Crown appellants argue that the increased sentences which may result after *Friesen* immunize the mandatory minimums at issue. While a proper understanding of the wrongfulness and harmfulness of luring will lead to significant penalties in most circumstances, the constitutional analysis under s. 12 of the *Charter* does not merely ask whether the mandatory minimum is cruel and unusual in “common” cases (*Nur*, at para. 68). Indeed, the use of reasonably foreseeable scenarios is expressly designed to test the lower end of the spectrum of conduct captured by the offence (see, e.g., *Hills*, at para. 169).

[107] The present constitutional analysis does not disturb the maximum sentence established by Parliament, the sentencing range for luring affirmed in *Morrison* or this Court's clear guidance in *Friesen*. The sole question is whether the mandatory

minimum sentences in s. 172.1(2), which deprive courts of the ability to “tailor proportionate sentences at the lower end of a sentencing range” (*Nur*, at para. 44), impose cruel and unusual punishment in reasonably foreseeable cases.

[108] Put simply, the constituent elements of the child luring offence are so broad and unconstrained as to capture conduct that is only remotely related to the heart of the offence (see, e.g., *Hills*, at para. 122). This is ultimately what makes the mandatory minimum provisions constitutionally suspect. Parliament could have limited the conduct captured by the mandatory minimums or built in a “safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment” (*R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 36); it did not do so here. As with any other challenged provision, this Court must carefully evaluate the constitutionality of the mandatory minimum sentences at issue.

[109] For a mandatory minimum sentence to be found unconstitutional pursuant to s. 12 of the *Charter*, it must be “so excessive as to outrage standards of decency” (*Hills*, at para. 109, citing *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 45; *Lloyd*, at para. 24, citing *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 26; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895, at para. 4, citing *Smith*, at p. 1072). Only on “rare and unique occasions” will a sentence infringe s. 12 (*Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417). As I outline below, the mandatory minimum sentences for luring meet this high threshold and must be struck. Although the mandatory minimum penalties are not grossly disproportionate as applied

to Mr. Bertrand Marchand and H.V., they are when applied to reasonably foreseeable scenarios.

A. *A Fit, Proportionate Sentence*

[110] As explained, the fit and proportionate sentence for Mr. Bertrand Marchand's luring of the victim is 12 months' incarceration, which mirrors the mandatory minimum for the indictable offence to which he pleaded guilty. As a result, s. 172.1(2)(a)'s mandated minimum sentence is not grossly disproportionate in his circumstances.

[111] In the appeal concerning H.V., who was 52 years old at the material time, he pleaded guilty to child luring prosecuted by summary conviction, under s. 172.1(1)(a), for texts sent to the victim, his 16-year-old niece and godchild, between July 31 and August 9, 2017. During a family dinner at his home while he was alone with the victim, H.V. told her that she had nice buttocks and breasts. That same evening, he began sending her sexual text messages, which he continued to do for a period of 10 days. In these texts, he repeatedly asked her to delete his communications and keep them to herself. H.V. suggested to the victim's mother that she come work for him at the school where he was the principal. On her second day of work, he touched her breasts. She subsequently left her job and filed a criminal complaint. Although H.V. was also initially charged with secondary offences in relation to the illegal sexual touching of the victim's breasts, he pleaded guilty to and was sentenced only for the child luring count. At sentencing, H.V. challenged the six-month mandatory minimum

sentence for luring proceeding by summary conviction under s. 172.1(2)(b), pursuant to s. 12 of the *Charter*.

[112] The sentencing judge at the Court of Québec imposed a sentence of 2 years' probation and 150 hours of community service reasoning that this conduct fell at the lower end of the moral blameworthiness scale and thus warranted a probationary sentence. Since the six-month mandatory minimum sentence would be grossly disproportionate to this sentence, it infringed s. 12 of the *Charter* and the judge declared it inoperable in regards to H.V. On appeal, the Superior Court of Quebec (2021 QCCS 837) allowed the appeal, set aside the sentence and replaced it with a sentence of four months' imprisonment (which was reduced to 90 days' imprisonment to be served intermittently to account for time served). This was because, among other things, the sentencing judge erred regarding the principle of parity of sentences when he relied on outdated jurisprudence in luring cases which ignored the trend towards increased length of sentences for these types of offences. This error in principle led the judge to impose a conditional sentence which constituted a marked departure from sentences usually inflicted in luring cases even before the release of *Friesen* and *Montour*. The Superior Court also noted errors in the sentencing judge's analysis of aggravating and mitigating factors which further justified its intervention in order to determine the appropriate sentence of four months' imprisonment. The court then determined that the six-month mandatory minimum sentence was not grossly disproportionate to H.V.'s sentence, but would be grossly disproportionate when applied to reasonably foreseeable scenarios. The Quebec Court of Appeal dismissed

the appeal. It found no error with respect to a four-month custodial sentence and agreed with the court below that the mandatory minimum sentence was unconstitutional (2022 QCCA 16). I accept that the fit and proportionate sentence for H.V. is four months' imprisonment.

[113] For his part, H.V. did not argue that the six-month mandatory minimum outlined in s. 172.1(2)(b) is grossly disproportionate when applied to his circumstances (see R.F., at para. 21). Instead, he argued here and in the courts below that the mandatory minimum sentence imposes a cruel and unusual punishment, thereby violating s. 12 of the *Charter*, when applied to reasonably foreseeable scenarios. I agree with H.V. that the six-month term of imprisonment required as a result of the mandatory minimum is not grossly disproportionate to the fit sentence of four months' imprisonment. Given that neither the sentence for Mr. Bertrand Marchand nor H.V. is grossly disproportionate, I will review reasonable hypothetical scenarios to determine whether the mandatory minimum sentences are unconstitutional.

B. *The Reasonably Foreseeable Scenarios Advanced*

[114] This Court recently affirmed in *Hills* that punishments can be impugned where they infringe the s. 12 *Charter* rights of a reasonably foreseeable offender (para. 68). To foreclose this option would “artificially constrain the inquiry into the law’s constitutionality” (*Nur*, at para. 49). The use of representative offenders is “at the protected core of the s. 12 analysis” (*Hills*, at para. 71; see also *Nur*, at paras. 47 and 49-50). As such, when parties raise hypothetical scenarios as part of the adversarial

process, a court should not dismiss a constitutional challenge without considering (1) whether the scenario is, in fact, reasonably foreseeable and, if so, (2) whether the representative offender's scenario could render the impugned law unconstitutional.

[115] Both Mr. Bertrand Marchand and H.V. proffered several hypothetical scenarios in the courts below that they argue render the mandatory minimum sentences unconstitutional. They are raised again here. Mr. Bertrand Marchand referenced the facts of the representative offender considered by the Nova Scotia Court of Appeal in *Hood*. All parties in Mr. Bertrand Marchand's appeal agreed this scenario was reasonably foreseeable. During the hearing for H.V., I raised a scenario inspired by the facts of *R. v. John*, 2018 ONCA 702, 142 O.R. (3d) 670. I amended it to ensure the facts make out the luring offence. This Court's reasons in *Hills* direct that hypothetical scenarios are best tested through the adversarial process (para. 93). As such, I put the scenario to the appellants and the contours of the scenario were discussed during the hearing. While both Mr. Bertrand Marchand and H.V. make reference to other reasonably foreseeable scenarios, I am of the view that the scenarios identified in *Hood* and *John* are dispositive of the s. 12 analysis.

[116] For the purposes of the constitutionality analysis for the one-year mandatory minimum sentence as outlined in s. 172.1(2)(a), the first scenario is as follows:

- The representative offender is a first-year high school teacher in her late 20s with no criminal record. The offender has been diagnosed with bipolar disorder. One evening, she texts her 15-year-old student to inquire about a school assignment. Feeling manic, she directs the conversation from casual to sexual. The two meet that same evening in a private location where they both participate in sexual touching. The offender does not engage inappropriately with the student on any further occasions. The offender pleads guilty and expresses remorse on sentencing. See *Hood*, at para. 150.

[117] Mr. Bertrand Marchand also proffered this scenario at the Court of Appeal for the panel's consideration. Because the majority agreed with the sentencing judge that s. 172.1(2)(a) was unconstitutional as applied to Mr. Bertrand Marchand, it did not consider this scenario. With respect to the dissenting judge, his refusal to consider any scenario advanced by Mr. Bertrand Marchand as part of his constitutionality analysis was in error.

[118] As noted above, this scenario was also previously considered by the Nova Scotia Court of Appeal in *Hood*. The court found this scenario was reasonable and not remote or far-fetched. The hypothetical offender in the scenario in *Hood* was loosely based on the offender, Ms. Hood, herself: both were teachers diagnosed with bipolar disorder. However, rather than engaging with several victims as was the case for Ms. Hood, the representative offender only engaged in luring on one occasion with one

victim. I agree with the Nova Scotia Court of Appeal that this hypothetical scenario is not far-fetched and falls squarely within the scope of the offence, albeit on the less serious end of offending behaviour (para. 152). The scenario does not run afoul of this Court's direction in *Hills* that the personal characteristics of representative offenders should not be tailored to create far-fetched examples (para. 78). The court misspoke, however, by describing a portion of the offending conduct as "fond[ling]" (*Hood*, at para. 150), because describing sexual violence against children in this way incorrectly implies the behaviour is "inherently less harmful than other forms of sexual violence" (*Friesen*, at para. 144). I have revised the scenario accordingly. With this revision, the first scenario is reasonably foreseeable. The appellants in Mr. Bertrand Marchand's appeal conceded the same during oral argument.

[119] For the purposes of the constitutionality analysis for the six-month mandatory minimum sentence as outlined in s. 172.1(2)(b), the second scenario is as follows:

- The representative offender is an 18-year-old who is in a romantic and sexual relationship with a 17-year-old. In one text, the offender asks her to send him an explicit photo. She does, and he then forwards that photo to his friend without his girlfriend's knowledge. This friend, who is also 18, does not transmit this photo to anyone, but retains it on his mobile phone. See *John*, at para. 29.

[120] This scenario is inspired by one approved by the court in *John*. In that case, the Ontario Court of Appeal considered the constitutionality of the then six-month mandatory minimum sentence for possession of child pornography (s. 163.1(4)(a)) pursuant to s. 12 of the *Charter*. The scenario proffered involved an 18-year-old whose friend forwards him a “sext” from the friend’s 17-year-old girlfriend without her knowledge (para. 29). Specifically, the court found that the scenario is reasonable because it falls outside the private use exception outlined in *Sharpe* and would thereby attract criminal liability (*John*, at para. 38). The court ultimately found the mandatory minimum in that case would be grossly disproportionate for this hypothetical offender and it was declared of no force or effect. The scenario I proposed for luring also falls outside the private use exception outlined in *Sharpe* because the exception does not apply to the publishing or distributing of child pornography (see *Sharpe*, at para. 117). Here the representative offender, the boyfriend, distributed the child pornography to a third party, his friend, contrary to s. 163.1(3) of the *Criminal Code*.

[121] This scenario makes out the constituent elements of the offence of luring and is reasonable in view of the range of conduct captured by the luring offence (see *Hills*, at para. 82). Section 163.1(3) is one of the secondary offences referenced in s. 172.1(1)(a). The representative offender in this scenario texted his underage girlfriend with the purpose of facilitating the secondary offence of distributing child pornography (s. 163.1(3)). Further, though the scenario falls at the less serious end of the spectrum of conduct captured by the child luring offence, I find that it is reasonably foreseeable. Teenagers do send one another sexualized photos involving partial nudity

(see L. Karaian and D. Brady, “Revisiting the ‘Private Use Exception’ to Canada’s Child Pornography Laws: Teenage Sexting, Sex-Positivity, Pleasure, and Control in the Digital Age” (2019), 56 *Osgoode Hall L.J.* 301, at p. 306). In fact, the practice is commonplace enough that the term “sexting” has gained mainstream recognition. As well, at the hearing, counsel for the appellant His Majesty the King conceded that this scenario was reasonably foreseeable.

C. *A Fit Sentence for the Representative Offenders*

[122] In addressing the first stage of the s. 12 analysis and in setting the fit and proportionate sentence for the particular or representative offender, courts must define as specific a sentence as possible (*Hills*, at para. 94). “Scrupulously selecting a precise and defined sentence also supports an analytically fair and principled result at the second stage of the s. 12 inquiry” (para. 65). The comparative exercise central to the gross disproportionality analysis requires careful adherence to established sentencing principles in the first stage. To determine the fit and proportionate sentence for the representative offenders at bar, the Court must consider the sentencing objectives as set out in ss. 718 and following of the *Criminal Code*. Any court determining a fit sentence for a representative offender must examine any aggravating and mitigating factors at play and exercise restraint in imposing terms of incarceration (s. 718.2(d) and (e)). Sentencing judges and appellate courts must not magnify aggravating factors or narrow mitigating ones to reach desired conclusions.

[123] Section 718.1 directs that sentences “must be proportionate to the gravity of the offence and the degree of responsibility of the offender”. Additionally, s. 718.01 directs judges to give primary consideration to denunciation and deterrence when sentencing offences involving abuse against children. At the same time, judges do retain judicial discretion to weigh other relevant sentencing objectives in the circumstances. Courts must individualize the sentence by accounting for the gravity of the offence, the offender’s individual circumstances and the offender’s moral culpability (*R. v. Parranto*, 2021 SCC 46, at para. 44; *Lacasse*, at para. 12; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 51). Even where Parliament has directed that the objectives of denunciation and deterrence are paramount at sentencing, judges must apply all the principles mandated by ss. 718.1 and 718.2 to craft a sentence that “furthers the overall objectives of sentencing” (*Ipeelee*, at para. 51). Deference to Parliament’s objectives is not unlimited; to ensure respect for human dignity, the door to rehabilitation must remain open (*Bissonnette*, at paras. 46 and 85; *Hills*, at paras. 140-41; *Nasogaluak*, at para. 43).

(1) A Fit Sentence for Luring in the First Reasonably Foreseeable Scenario

[124] In *Hood*, when the Nova Scotia Court of Appeal considered a scenario similar to that of the first scenario proffered here, it concluded that the hypothetical crime would likely attract a suspended sentence with probation or, *at most*, a brief period of incarceration (para. 154). Instead the court found that a global fit sentence for the representative offender would be a suspended sentence with a term of probation.

However, *Hood* was decided before this Court's decision in *Friesen*. The fit sentence assigned by the Court of Appeal in *Hood* is not reflective of the directive from *Friesen* that sexual offences against children are violent crimes that "wrongfully exploit children's vulnerability" and as such "[s]entences for these crimes must increase" (para. 5). Interestingly, in *Friesen*, this Court cited *Hood* as an example of an offender whose serious cognitive limitations would likely reduce her moral culpability at sentencing (para. 91).

[125] In the unique circumstances of this hypothetical scenario, the inherent wrongfulness and severity of the offence must be balanced against the offender's mental illness, remorse, and prospects of rehabilitation. A fit sentence for the luring offence committed by the representative offender in the first scenario is a 30-day intermittent sentence.

[126] The representative offender is a high school teacher in her late 20s who committed a serious breach of her professional duties and inappropriately directed a conversation with her 15-year-old student towards sexual matters with the intention of facilitating the secondary offence under s. 151 of the *Criminal Code*. Although this teacher would presumably be relatively junior as compared to her colleagues, she holds a position of trust and authority in relation to her student per s. 718.2(a)(iii). A breach of trust is "likely to increase the harm to the victim and thus the gravity of the offence" (*Friesen*, at para. 126). The severity of such a breach is not to be taken lightly: teachers are entrusted to educate and serve as role models for children, not to sexualize them for

their own purposes. In this case in particular, the representative offender exploited her position of authority in the commission of the offence, including by using her relationship to the victim to gain access by texting him under the guise of discussing homework. This element increases her moral blameworthiness and serves as an aggravating factor. As well, the wide age gap between the offender and the victim is further aggravating: as the offender was in her late 20s, there is at least a 10-year age difference.

[127] At the same time, it is important to acknowledge that while the representative offender's conduct was serious, it likely falls at the lower end of the range of gravity in all the circumstances. All offences of this type have the potential to cause substantial harm to victims. However, it remains significant that this offender's actions were spontaneous and of short duration, rather than malicious and calculated. Unlike in many other child luring cases that are typically associated with prolonged contact, and thereby far greater harm, in this case there is no evidence of grooming or long term planning. While these factors are not mitigating, they do provide insight into the overall gravity of the offence and culpability of the offender, which is comparatively lower than in other cases. It is well established that spontaneous or spur of the moment crimes should be punished less severely than planned or premeditated ones (see, e.g., *R. v. Laberge* (1995), 165 A.R. 375 (C.A.), at para. 18; *R. v. Murphy*, 2014 ABCA 409, 593 A.R. 60, at para. 42; *R. v. Vienneau*, 2015 ONCA 898, at para. 12 (CanLII)). Furthermore, the representative offender entered a guilty plea, expressed

remorse on sentencing and has no prior criminal record — all of which *are* significant mitigating factors.

[128] Finally, in assessing the offender’s moral culpability, it is significant that the representative offender in the first scenario was diagnosed with bipolar disorder and her symptoms were similar to the actual offender described in *Hood*. At trial, Ms. Hood’s criminal responsibility was an issue of real controversy (*R. v. Hood*, 2016 NSPC 19, 371 N.S.R. (2d) 324; see also the reasons for sentence in *R. v. Hood*, 2016 NSPC 78). Although the trial judge did find her to be criminally responsible, he accepted that Ms. Hood experienced bipolar disorder type I. As a result, Ms. Hood’s “mania rendered her profoundly disinhibited and prone to risk taking, elevated by a sense of invincibility, and impaired by defective insight and inhibition” (*Hood* (sentencing reasons), at para. 55 (CanLII)). The sentencing judge in *Hood* found that her symptoms had “a nexus with her crimes” (para. 55). Similarly, in the instant case the representative offender’s bipolar diagnosis, though it serves as no justification or excuse for her behaviour, attenuates her degree of responsibility and acts as a mitigating factor on sentencing (*R. v. Ayorech*, 2012 ABCA 82, 522 A.R. 306, at paras. 10-13; *R. v. Tremblay*, 2006 ABCA 252, 401 A.R. 9, at para. 7; *R. v. Belcourt*, 2010 ABCA 319, 490 A.R. 224, at para. 8; *R. v. Resler*, 2011 ABCA 167, 505 A.R. 330, at para. 14). Where a mental illness existed at the time of the offence and contributed to the offender’s behaviour, sentencing judges should consider prioritizing rehabilitation and treatment through community intervention (*R. v. Lundrigan*, 2012 NLCA 43, 324 Nfld. & P.E.I.R. 270, at paras. 20-21; *R. v. Ellis*, 2013 ONCA 739, 303 C.C.C. (3d) 228, at

para. 117). This is especially the case given that offenders with mental illnesses are often distinctly negatively affected by imprisonment (see Ruby, at §§5.325 and 5.332).

[129] Even so, while rehabilitation must be prioritized for this offender, a non-custodial sentence is not appropriate given the seriousness of the offence. In the result, I find a 30-day intermittent sentence is a fit sentence for the representative offender at bar. Such a sentence recognizes the inherent seriousness and potential harms associated with the offence and appropriately denounces her conduct, while also being mindful of her diminished moral blameworthiness and the mitigating factors at play.

(2) A Fit Sentence for Luring in the Second Reasonably Foreseeable Scenario

[130] The representative offender in the second scenario engaged in a serious breach of the victim's privacy and dignity that should be condemned by a criminal sanction. However, the significant mitigating factors in this scenario warrant a sentence on the low end of the spectrum. A fit sentence for the luring that the representative offender in the second scenario engaged in is a conditional discharge.

[131] The 18-year-old offender texted his 17-year-old girlfriend with the intent to wrongfully transmit a pornographic photo of her to his friend. It is important to emphasize that this was far from an innocent communication: the basis for criminal liability is the accused's intent to send the photo on to a person for whom it was *not* intended, as he could not have been convicted of luring if the photo was for his own private use (see *Sharpe*). The representative offender should have known that sharing

a sexualized photo of his underage, adolescent partner with a third party was not only impermissible, but harmful, particularly given the risk that the photo could have been distributed on to other recipients and could have thereby exposed the victim to bullying and sexual extortion (see A. Carlton, “Sextortion: The Hybrid ‘Cyber-Sex’ Crime” (2020), 21:3 *N.C. J.L. & Tech.* 177, at p. 180). Even putting aside that this risk of further distribution did not materialize, non-consensual distribution of an intimate image is inherently associated with loss of dignity and autonomy, and could lead to a profound sense of shame as well as reduced trust in future romantic partners. In light of the seriousness of the representative offender’s behaviour at the expense of the adolescent victim, a criminal sanction is warranted.

[132] That said, the most significant mitigating factor in this second scenario is that the offender is a youthful first offender. Although the 18-year-old offender is legally an adult and the 17-year-old victim is not, without minimizing the impact of the offence on the victim, an appropriate sentence must account for the fact that *both* parties are young, close in age, and in a consensual relationship that shows no signs of the long-term exploitation or grooming that is involved in many child luring cases. Similar to the representative offender considered in *Hills*, the criminalized conduct in this case indicates a lack of guidance or adult mentorship more than it does the offender’s criminal intent (para. 161). Rehabilitation and individual deterrence are primary sentencing objectives when sentencing youthful first offenders. Even though an 18-year-old offender falls outside the scope of the youth criminal justice system, his lack of maturity remains an important consideration (*R. v. Priest* (1996), 30 O.R. (3d) 538

(C.A.), at pp. 543-44; *R. v. Tan*, 2008 ONCA 574, 268 O.A.C. 385, at para. 32; *R. v. T. (K.)*, 2008 ONCA 91, 89 O.R. (3d) 99, at paras. 41-42). It is crucial that all other dispositions be explored before imposing custodial sentences on youthful first offenders (*R. v. Stein* (1974), 15 C.C.C. (2d) 376 (Ont. C.A.), at p. 377).

[133] Here, a conditional discharge with strict probationary terms would serve the objectives of deterrence and denunciation. By contrast, a custodial sentence would be disproportionate and would not reflect the reduced degree of responsibility of a youthful first offender who would primarily benefit from re-education, not excess punishment. As a result, I would sentence this representative offender to a six-month conditional discharge with probation.

D. *The Mandatory Minimum Penalties Are Grossly Disproportionate to the Fit Sentences for the Representative Offenders*

(1) Scope and Reach of the Offence

[134] The scope and reach of the luring offence renders it constitutionally suspect. The jurisprudence instructs that where a mandatory minimum sentence captures disparate conduct of widely varying gravity and degrees of offender culpability, it may be more vulnerable to constitutional challenge (*Hills*, at para. 125; *Lloyd*, at para. 24; *Smith*, at p. 1078). This Court noted in *Lloyd* that mandatory minimum penalties for offences “that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable”

(para. 3). This is because when an offence is inordinately broad, the mandatory sentence may be proportionate or permissible for most offenders, but grossly disproportionate for other offenders who are far less culpable or whose conduct is far less harmful (*Nur*, at para. 83; *Hills*, at para. 125). As part of this analysis, courts should assess how broad a range of conduct is captured by the *actus reus* and *mens rea* of the offence and consider the included degree of variation in the offence’s gravity and the offender’s culpability (*Hills*, at para. 129). While Parliament is not precluded from legislating mandatory minimum sentences, Parliament must not mandate grossly disproportionate sentences that subject any offender to cruel and unusual punishment.

[135] The three elements of child luring pursuant to s. 172.1 are: (1) the accused communicated *intentionally* by telecommunication; (2) with someone the accused knows or believes is under 18 years of age (or 16 or 14, depending on the applicable paragraph); and (3) the accused’s communication was for the specific purpose of facilitating the commission of a designated secondary offence with respect to the underage person (*Legare*, at para. 36; *Levigne*, at para. 23). In the context of a police “sting” operation, where the complainant is not in fact a child, the knowledge/wilful blindness element is replaced by the accused’s *belief* that their interlocutor is a child.

[136] The *actus reus* of child luring includes communication with the complainant by means of telecommunications. The term “telecommunications” is defined in s. 35(1) of the *Interpretation Act* as “the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire,

cable, radio, optical or other electromagnetic system, or by any similar technical system”. As an inchoate offence, child luring stands separate and apart from the designated secondary offences. Moreover, it attaches to a broad range of secondary offences, and “can be committed in various ways, under a broad array of circumstances” (*Morrison*, at para. 179, per Karakatsanis J., concurring). In the context of the luring offence, “facilitating” means “helping to bring about and making easier or more probable” (*Legare*, at para. 28 (emphasis deleted)).

[137] Relying on *Paradee*, the intervener the Attorney General of Alberta argues that the *mens rea* for child luring is narrow and specific. In its view, the Crown must prove that the accused subjectively foresaw that the luring communication would facilitate an offence involving abuse of a child and that the accused acted with the intention to facilitate that goal. In *Paradee*, the Court of Appeal of Alberta stated that luring “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” (para. 12). Similarly, this Court has previously discussed child luring by reference to “predators lurking in cyberspace, cloaked in anonymity, using online communications as a tool for meeting and grooming children with a view to sexually exploiting them” (*Morrison*, at para. 2).

[138] However, common characteristics of an offence should not be conflated with its essential elements. While the luring offence certainly captures the mental states

described in *Paradee*, they are not part of its requisite *mens rea*. Pre-meditation or planning may not always be present where the elements of child luring are made out. An accused may impulsively communicate in a sexual manner — and *in that moment* have the specific intent required to ground a conviction for child luring — without having taken time beforehand to plan, contemplate, or prepare to execute a secondary offence. Neither does “grooming” necessarily accompany the commission of the child luring offence. Evidence of grooming may often be present where child luring is made out, but it is not a required element.

[139] In this way, the specific intent element — that the accused must communicate with the purpose of facilitating a designated offence — is not narrow but broad. Section 172.1(1) captures a wide range of designated illicit purposes with varying degrees of moral culpability. For example, the jurisprudence demonstrates that offenders with developmental disabilities, though less morally blameworthy, are often convicted of child luring (*Melrose; Deren; R. v. S. (S.)*, 2014 ONCJ 184, 307 C.R.R. (2d) 147). In *Morrison*, Justice Karakatsanis noted that s. 172.1(2)(a) is vulnerable to constitutional challenge because “[t]he range of conduct that constitutes an offence under this section is extremely broad” (para. 181).

[140] As mentioned above, the luring offence is triggered by the use of *any* telecommunication platform. This includes any and all internet platforms, be it Facebook, Instagram, TikTok, Snapchat, Twitch, Hinge, Tinder or other popular messaging, streaming or dating applications. Not only does this demonstrate the

massive breadth of the luring offence, it also raises the issue of the medium and its effect on the message. For example, certain online applications require users to indicate they are the age of the majority and old enough to be present on the platform. However, this requirement can be bypassed by underage users with the click of a button. Or, as was the case in *Koenig*, adult users who use internet sites not designed for predatory purposes may wrongfully engage in conversation with a minor that constitutes luring without making best efforts to verify the age of other users they engage with online.

[141] This is not to say that individuals who engage sexually with children online are not morally blameworthy. However, in certain cases the impugned conduct may not rightly attract jail time. In *Koenig*, Justice Skilnick noted that “the Accused is not the typical offender that Parliament had in mind when it passed its legislation. He did not seek out or attempt to “lure” a child, and in fact his communications were on a website that does not allow the user to pick the person he is communicating with” (para. 5 (CanLII)).

[142] The child luring offence also, rightly, punishes both offenders who communicate with actual children and offenders who ultimately communicate with police officers posing as children through sting operations. In *Friesen*, this Court noted that though the absence of a specific child victim should not be overemphasized in setting a fit sentence, it remains relevant to the proportionality analysis (para. 93). In this way, this Court acknowledged a material difference between the two main ways child luring may be committed: where the offender is actually communicating with an

underage person versus where the offender is under the impression he is communicating with someone underage but in actuality is communicating with law enforcement. This further demonstrates the provision's breadth.

[143] The range of conduct captured is staggering. Notably, the offender need not actually commit any secondary offence. He need only communicate with an underage person for the purpose of facilitating one of the *twenty* secondary offences including: sexual exploitation (s. 153(1)), incest (s. 155), child pornography (s. 163.1), procuring sexual activity (parent or guardian) (s. 170), permitting prohibited sexual activity (householder) (s. 171), trafficking of persons under 18 (s. 279.011), receiving benefit from the trafficking of persons under 18 (s. 279.02(2)), withholding or destroying travel documents in service of trafficking persons under 18 (s. 279.03(2)), obtaining sexual services for consideration from a person under 18 (s. 286.1(2)), receiving materials benefit from the sexual services provided by a person under 18 (s. 286.2(2)), procuring a person under 18 to provide sexual services (s. 286.3(2)), sexual interference (s. 151), invitation to sexual touching of a person under 18 (s. 152), bestiality in the presence of or by a child (s. 160(3)), exposure to a person under 16 (s. 173(2)), sexual assault of a person under 16 (s. 271), sexual assault with a weapon of a person under 16 (s. 272), aggravated sexual assault of a person under 16 (s. 273), abduction of a person under 16 (s. 280), and abduction of a person under 14 (s. 281). In turn, while all of the secondary offences have the potential to cause devastating harm to victims and typically warrant harsh sentences, those offences are, amongst themselves, of varying degrees of seriousness, and the scope of several of them is *also*

wide. These features of the luring offence further threaten the constitutionality of its mandatory penalties.

[144] Lower courts have increasingly noted that the luring offence applies to a wide range of conduct and captures varying degrees of moral blameworthiness (*R. v. Saffari*, 2019 ONCJ 861, at para. 88 (CanLII); *Sutherland*, at para. 47). This was also previously recognized by Justice Karakatsanis in her concurring reasons in *Morrison*. There, Justice Karakatsanis explained that the purpose of the luring can vary: offenders might use the internet to “target children for the purpose of physically exploiting them” or offenders might have “no intention of meeting their victims in person” (para. 182). Similarly, the duration of the communications can vary: some cases may involve “extended dialogue with the victim in order to ‘groom’ him or her” but other cases might involve “a short series of messages lasting only a few minutes” or even “a single text” (para. 182). Finally, she noted that the communications could be between the offender and an actual child, or between an offender and a police officer conducting a sting operation. Justice Karakatsanis aptly noted that this range of conduct and of moral blameworthiness “may impact the level of harm caused by the offence, thereby informing what constitutes a fit and proportionate sentence” (para. 182).

[145] An examination of the jurisprudence offers additional insight into the range of moral blameworthiness foreseeably captured by s. 172.1. For example, the offender in *Melrose*, who pleaded guilty to offences including luring, was a developmentally delayed adult aged 27 with an IQ that corresponded to the mental age of around a

9-year-old (para. 132). The victim was 13. The sentencing judge, Justice Renke, found that the offender's mental age was below the victim's chronological age. The evidence revealed that Mr. Melrose was unable to anticipate the long-term consequences of his actions and the effect his actions may have on the underage victim (para. 145). The sentencing judge found that the offender "did not understand the types of harms risked by his conduct" and reasoned that Mr. Melrose's cognitive difficulties greatly reduced the offender's moral blameworthiness (paras. 229-32). Justice Renke noted that luring's requirement that the offender attempt to "facilitate" a secondary offence "runs the gamut from the impulsive (albeit still intentional) to the carefully calculated" (para. 331). Because proof of facilitation does not necessarily include proof of complex planning, the luring offence can capture conduct that is bereft of sophistication or considered intention. In the result, the *mens rea* of the offence does not necessitate a high degree of moral blameworthiness and instead captures a broad range of culpable conduct.

[146] Despite this breadth, the distinct harm of luring will, in many cases, rightly attract a term of imprisonment that falls within the range of the mandatory minimum sentence. This is because in many cases the gravity of the offence is high: the harms are distinct and the conduct is inherently wrongful. As set out in *Friesen* and reiterated above, luring involves sexual violence, carried out via the internet, and can cause pervasive and permanent serious psychological harm to victims (paras. 56-58 and 82). Despite the inherent gravity of the offence, the Court in *Friesen* directed that factors that reduce the offender's moral culpability remain relevant. Chief Justice Wagner and

Justice Rowe, writing for a unanimous Court, acknowledged that in the case of sexual assault and sexual interference committed against children, these are “broadly-defined offences that embrace a wide spectrum of conduct” so, as a result, “the offender’s conduct will be less morally blameworthy in some cases than in others” (para. 91). The impugned offence typifies this reality. The incredible breadth of offending conduct is not reflected in the rigidity of the mandatory minimum sentence. While Parliament must be afforded deference in crafting sentencing provisions, s. 12 of the *Charter* imposes certain constitutional limits (*Hills*, at para. 140).

(2) The Effect of the Punishment on the Offenders

[147] The effect of the punishment on both representative offenders in this case is harsh. This Court directed in *Hills* that the gross disproportionality analysis must include consideration of what material effects the mandatory minimum may have on offenders subject to it (para. 133). Courts must examine the particular characteristics of the individual offender before them or consider the qualities of the reasonably foreseeable offender, and then evaluate what harm may result from the impugned punishment. In the instant scenarios, the mandatory minimum punishment is alternatively 12 months’ or 6 months’ incarceration.

(a) *The First Representative Offender*

[148] Evidence that imprisonment would have significant deleterious effects on an offender should be considered at this stage (*Hills*, at paras. 133-35). The

representative offender in the first scenario was diagnosed with bipolar disorder and her symptoms mirrored that of the actual offender described in *Hood*. In certain circumstances, courts have found extended periods of incarceration served in custody inappropriate for individuals with bipolar disorder and have instead ordered offenders to seek psychiatric care, attend treatment programs and/or serve their sentences in community in lieu of a custodial sentence (see *R. v. Dickson*, 2007 BCCA 561, 228 C.C.C. (3d) 450; *R. v. Shevchenko*, 2018 ABCA 31, at paras. 60-63 (CanLII); *R. v. Vivian*, 2001 ABQB 468, 289 A.R. 378, at para. 16; *R. v. Sulek*, 2011 ABPC 314, 21 M.V.R. (6th) 336; *R. v. Legg*, 2014 ABPC 238, 26 Alta. L.R. (6th) 181, at para. 28).

[149] The Office of the Correctional Investigator has accepted that the conditions of confinement can be disproportionately harsh on individuals with mental disorders. The carceral setting can induce or augment disordered symptoms and, in turn, these symptoms may be met with security-driven interventions that exacerbate mental health issues in offenders (see, e.g., Office of the Correctional Investigator, *Annual Report 2021-2022* (2022), at p. 25; Office of the Correctional Investigator, *A Legacy of Missed Opportunities: The Case of Ashley Smith*, November 23, 2011 (online)). Further, prisoners in certain federal institutions may wait up to 12 months before gaining access to mental health services (see *Annual Report 2021-2022*, at p. 14). In *Ayorech*, the offender was diagnosed with schizophrenia and a developmental disorder. The Court of Appeal found that Mr. Ayorech's mental disorders left him vulnerable in an institutional setting and accepted the expert witness' conclusion that the offender was "ill equipped to survive in the prison system" (para. 13).

[150] Although the first representative offender is not developmentally delayed, several lower courts have struck mandatory minimums for luring or declined to apply them in the context of offenders with severe developmental disabilities with a view to the harsh impacts of imprisonment on these individuals (see *Melrose*; *Deren*; *Fawcett*). In *Melrose*, the sentencing judge found that the offender would be a “child among men” in a custodial setting and would be taken advantage of by members of the institution’s general population (para. 250). Justice Renke found that Mr. Melrose “would be harmed, emotionally, psychologically, and likely physically, should he be sentenced to any significant period of imprisonment” (para. 250). Incarceration also has a disproportionate effect on individuals with significant cognitive impairments by disrupting the necessary supports that have been implemented to help these individuals live a life of dignity. The sentencing judge in *Deren* declined to impose the six-month mandatory minimum for luring on an offender with severe developmental disabilities, in part because a jail sentence of that length would impact his access to Assured Income for the Severely Handicapped, as well as his housing and limited employment (para. 70).

[151] The effect of the one-year mandatory minimum on the first representative offender is harsh. Not only does it replace a short intermittent sentence with a year of incarceration, the offender’s individual circumstances would likely make her experience of incarceration perilously grave. In *R. v. Valiquette* (1990), 60 C.C.C. (3d) 325 (Que. C.A.), the court noted “most people understand that the mentally ill require treatment and supervision, not punishment” (p. 331). Most often, mental illness is

viewed as a mitigating factor at sentencing as it may reduce an offender's moral culpability and sentencing judges recognize that offenders with mental disorders are particularly affected by imprisonment (see Ruby). Each of these factors indicate the mandatory minimum's constitutional infirmity.

(b) *The Second Representative Offender*

[152] The second representative offender is a youthful offender — a group the criminal law views as holding high rehabilitative prospects. The mandatory minimum in the instance case would replace the fit sentence of a conditional discharge with a substantial custodial sentence (see also *Hills*, at para. 143). As a youthful first-time offender, the representative offender should benefit from the shortest possible sentence proportionate to the offence at issue (see *R. v. Brown*, 2015 ONCA 361, 126 O.R. (3d) 797, at para. 7; *R. v. Laine*, 2015 ONCA 519, 338 O.A.C. 264, at para. 85). Youthful offenders are often bullied, pressured to join adult prison gangs, and are vulnerable to segregation placements (*Hills*, at para. 165; Office of the Correctional Investigator and Office of the Provincial Advocate for Children and Youth, *Missed Opportunities: The Experience of Young Adults Incarcerated in Federal Penitentiaries* (2017)). The six-month mandatory minimum in this case is a far cry from the shortest possible rehabilitative sentence for this offender.

(3) The Penalty and its Objectives

[153] Luring is a serious offence that must be punished accordingly. The offence dovetails with s. 718.01 of the *Criminal Code*, which, as mentioned above, directs that in imposing sentences for offences involving abuse of children, primary consideration must be given to the objectives of denunciation and deterrence. Parliament's decision to increase the maximum penalties for the luring offence in 2015 as part of the *Tougher Penalties for Child Predators Act* further indicates Parliament's view of the gravity of the offence. These legislative amendments should have an upward pull on sentences for this offence, regardless of whether the mandatory minimum remains intact.

[154] Parliament enacted s. 172.1 in response to the growth of the internet as a burgeoning domain for predators to target children (*Morrison*, at paras. 1-3). The access that sexual offenders have to children through social media is "unprecedented" (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 102). Young people are perpetually available online through their smartphones, tablets, computers and other electronic devices — all sites where they are vulnerable to being targeted.

[155] Child luring not only lays the foundation for dangerous in-person criminal offences, it also causes its own distinct harm to child victims.

[156] That being said, the attached mandatory minimum sentences go beyond what is necessary to achieve Parliament's sentencing objectives. The offence's wide net of potential liability, while an asset for the preventative nature of the offence, also serves as the constitutional undoing of its penalties. The broad nature of the offence captures a range of conduct with varying culpability. As a result, it thrusts a mandatory

punishment on conduct far removed and disconnected from that which Parliament sought to prevent.

[157] A comparison between the punishments imposed for several of the secondary offences and the mandatory minimum for luring further reveals a significant disproportion. While several of the 20 secondary offences associated with luring themselves attract no mandatory minimum penalty, others may attract far lower penalties than *either* mandatory minimum for the luring offence. For example, exposure prosecuted on summary conviction attracts a mandatory minimum of 30 days' imprisonment (see s. 173(2)(b)). This is not to suggest that luring does not create its own distinct harm, but it is clear the range of conduct captured by the offence's *actus reus* includes anything from years of careful grooming to a single online message to a complainant. It is striking that an impulsive message alone could attract a one-year term of imprisonment, while the offence the text attempted to facilitate could itself attract little to no incarceration.

[158] In the case of both representative offenders, the length of imprisonment required by the mandatory minimum sentences is excessive in light of alternative sentences that would be sufficient to meet Parliament's sentencing objectives. While a one-year or six-month minimum term of imprisonment for child luring will not be grossly disproportionate for most offenders, it is a severe punishment for certain offenders, particularly youthful offenders, offenders with mental disorders and those with severe developmental disabilities. Where an offender's mental illness contributes

to the commission of the luring offence, specific deterrence, general deterrence and denunciation are of little use because “such an offender is not an appropriate medium for making an example of others” and because people with mental illnesses will likely not be deterred by the punishment of others (Ruby, at §§5.316-5.321; see *Resler*, at para. 14; *R. v. Robinson* (1974), 19 C.C.C. (2d) 193 (Ont. C.A.), at p. 197; *Deren*, at para. 65). Instead, rehabilitation should hold greater weight when sentencing mentally ill offenders like the representative offender at bar (*R. v. Hynes* (1991), 89 Nfld. & P.E.I.R. 316 (N.L.C.A.), at para. 53). While this Court directed in *Friesen* that sentences for sexual offences against children should properly reflect the offender’s moral blameworthiness, the Court also acknowledged that the personal circumstances of an offender can have a mitigating effect and reduce the offender’s moral culpability (para. 91).

[159] In light of the reduced moral blameworthiness of mentally ill offenders, the mandatory minimums in relation to the luring offence not only deprive courts of the ability to tailor proportionate sentences at the lower end of the sentencing range when appropriate, they operate in the extreme to impose unjust sentences that violate the principle of proportionality (see *Nur*, at para. 44). As a result, the mandatory sentences demonstrate the “state’s complete disregard for the specific circumstances of the sentenced individual and for the proportionality of the punishment inflicted on them” (*Bissonnette*, at para. 61). Imposing six-months’ or one year’s incarceration on a mentally ill offender when the fit sentence is a relatively short intermittent sentence does not respect the fundamental principle of proportionality (*Nasogaluak*, at para. 40).

Instead, it indicates Parliament has prioritized denunciation and deterrence to the near complete exclusion of rehabilitation. This Court noted in *Hills* that while deference is owed to Parliament’s sentencing choices, “[n]o single sentencing objective should be applied to the exclusion of all others” (para. 140; *Nasogaluak*, at para. 43).

[160] Because intermittent sentences are only available for sentences of 90 days or less, the impugned mandatory minimum provides no discretion for courts to impose a sentence of this kind. While an intermittent sentence is a form of imprisonment, it is materially distinct from a full-time carceral sentence in that it allows offenders to serve their jail term in truncated periods while being subject to probation outside of jail. An intermittent sentence prioritizes rehabilitation by allowing offenders to potentially preserve their employment, maintain familial and community ties and continue specialized treatment that may not be available at a correctional institution. Here, the fact that the mandatory minimum does not permit courts to impose intermittent sentences where that sentence is the fit and proportionate sentence renders the provision constitutionally suspect (see *Hills*, at para. 144).

[161] Child luring is a hybrid offence, meaning that the Crown can choose, based on factors such as the seriousness of the accused’s actions and the harm caused, to proceed either by indictment or summarily. In turn, that choice impacts the severity of the sentence imposed, as the mandatory minimum attached to a summary luring conviction is six-months rather than a year for luring proceeding by indictment. Justice Karakatsanis noted that this legislative choice “clearly demonstrates that

Parliament understood that, in certain circumstances, a sentence far below that required by the one-year mandatory minimum would be appropriate” (*Morrison*, at para. 185). The disparity between the two mandatory minimum sentences outlined in s. 172.1(2)(a) and (b) is disquieting.

[162] The hybrid nature of the child luring offence cannot shield it from constitutional scrutiny. This Court has found that an unconstitutional mandatory minimum cannot be saved by the Crown’s discretion to proceed summarily. Sentencing is a judicial function, while Crown prosecutors are in an adversarial role to accused persons (*Nur*, at paras. 85-86). For the impugned offence, there is no clear delineation between cases that proceed summarily versus cases that proceed by indictment. In *R. v. C.D.R.*, 2020 ONSC 645, the accused was caught by a police sting operation and pleaded guilty to, amongst other offences, child luring. The Crown confirmed that cases of a similar nature may proceed either summarily or by indictment — little distinguished them (paras. 31-33 (CanLII)). Justice De Sa rightly queried, “[h]ow can a seemingly arbitrary imposition of an additional 6 months incarceration in this case not be grossly disproportionate?” (para. 33).

[163] Where a six-month sentence may be an appropriate sentence for a certain set of conduct but a one-year sentence is arbitrarily imposed instead, solely as a result of prosecutorial discretion, that leads to the same uncertainty and unpredictability in the law that this Court attempted to guard against in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96 (see para. 72) and *Nur* (see para. 91). The Crown’s election should not

determine whether an offender receives a fit sentence or an excessive sentence. This aspect of the sentencing regime would be intolerable and shocking to Canadians (see *Saffari*, at para. 90; *C.D.R.*, at paras. 31-33 and 38).

[164] Simply striking the one-year mandatory minimum and leaving the six-month punishment intact presents its own set of related issues — including an issue of parity. If the summary conviction punishment remains, an individual may be charged summarily for ostensibly less serious conduct than would be charged by indictment and potentially face a more serious punishment by virtue of the mandatory minimum. This potential outcome further highlights the difference between the role of a sentencing judge and the role of a Crown prosecutor. It is the judge’s role to craft a fit and proportionate sentence in light of the circumstances of the offender and the gravity of the offence after being presented with evidence of the offender’s background and individual circumstances. In contrast, the Crown prosecutor is tasked with using their discretion to choose a path to conviction with little information about the offender’s individual circumstances and while balancing other priorities. These include local judicial resources, considerations of delay and limitation periods, and the prospect of the complainant potentially being required to testify twice, given that the 14-year maximum penalty for the luring offence when prosecuted by indictment triggers the availability of a preliminary hearing.

[165] That arrangement would locate this offence squarely within a zone deemed problematic by this Court in *Nur*. To accept this state of affairs could “result in

replacing a public hearing on the constitutionality of [the provision] before an independent and impartial court with the discretionary decision of a Crown prosecutor” (para. 86). It would create the potential for an “uneven and unequal application of the law” (para. 91) where an individual can face a fixed mandatory minimum punishment instead of a fit and proportionate sentence crafted by a judge, depending solely on a discretionary decision by the assigned Crown prosecutor. The public’s perception of this imbalance may undermine its confidence in the administration of justice.

[166] The incredible breadth of the luring offence and its harsh effect on representative offenders paired with the discordant internal scheme of the penalty renders the mandatory minimums in s. 172.1(2) constitutionally infirm.

[167] Let me be clear. Sexual offences against children are serious crimes and often warrant strict sanctions. For this reason, applying *Friesen*’s principles to child luring will generally result in an increase in the sentences previously ascribed for these crimes. However, there is no incongruity between affirming the severe wrongfulness and harms that often accompany child luring offences and finding the mandatory minimums ascribed to these sentences unconstitutional. Mandatory minimum sentences establish the lowest possible punishment courts may render for the least culpable offender. They do not prevent judges from assigning lengthier sentences for more blameworthy conduct. As such, striking the mandatory minimum sentence should not disturb the effect that the maximum sentence has on sentencing outcomes. The guidance of *Friesen* on the primacy of denunciation and deterrence when sentencing

offenders for sexual offences against children remains. Removal of the mandatory minimum should not drain the deterrent effect of s. 172.1(2) any more than other offences where Parliament has directed denunciation and deterrence as primary sentencing objectives without assigning a mandatory minimum sentence.

V. Conclusion

[168] Parliament is entitled to create criminal offences for broad purposes and with wide applications. Similarly, it may prioritize deterrence and denunciation in the crafting of fit and proportionate sentences and impose high maximum sentences to convey its view of the gravity of a particular offence.

[169] However, when it imposes a mandatory minimum sentence for a given offence, which applies to all cases without discretion or discernment, it runs the risk of creating a grossly disproportionate and unconstitutional penalty. Exceptionally broad offences, even inherently serious ones, can be committed in a variety of ways and with different levels of harm and moral culpability. A predatory adult who communicates by means of telecommunication over a long period of time to manipulate a child for the purpose of facilitating one of the secondary offences in s. 172.1(1) may well merit a custodial sentence considerably in excess of the mandatory minimum. On the other hand, there will be cases in which the gravity of the offence and the degree of moral blameworthiness of the offender may not merit a custodial sentence at all — and in which the public would be shocked to hear that a legislated period of imprisonment automatically applies.

[170] This Court's decision in *Friesen* demands a more robust understanding of the wrongfulness and harms of luring, which will often yield greater penalties. However, given the enormous breadth of the luring offences, there will still be cases in which the mandatory minimum will be so out of sync with the realities of the gravity of the offence and the moral blameworthiness of the offender so as to shock the conscience of an informed public.

[171] Indeed, despite strong statements in *Friesen* about the inherent wrongfulness and harmfulness of sexual violence against children, the Court expressly cautioned that their comments should not be taken as a direction to disregard relevant factors that may reduce the offender's moral culpability. The proportionality principle still governs to require that "the punishment imposed be 'just and appropriate . . . and nothing more'" (para. 91, quoting *M. (C.A.)*, at para. 80 (emphasis deleted)).

[172] For the above reasons, I would allow the appeal in Mr. Bertrand Marchand's case in part and increase Mr. Bertrand Marchand's luring sentence to 12 months' incarceration to be served consecutively to his sexual interference sentence. Both parties in that appeal have agreed that the remainder of the respondent's sentence be permanently suspended. Accordingly, I order a permanent stay of execution of the modified sentence. I would affirm the conclusion in the courts below that the mandatory minimum sentence in s. 172.1(2)(a) is unconstitutional.

[173] I would dismiss the appeal in H.V.'s case, which has the effect of affirming that the mandatory minimum sentence in s. 172.1(2)(b) is unconstitutional.

[174] The mandatory minimum sentences in s. 172.1(2)(a) and (b) of the *Criminal Code* are inconsistent with s. 12 of the *Charter*, are not saved by s. 1 and are declared of no force or effect under s. 52 of the *Constitution Act, 1982*.

English version of the reasons delivered by

CÔTÉ J. —

TABLE OF CONTENTS

	Paragraph
I. <u>Overview</u>	175
II. <u>Analysis</u>	182
<i>Section 172.1(2) Cr. C. Does Not Violate Section 12 of the Charter</i>	182
(1) <u>The Fit and Appropriate Sentence for the Offender in the First Reasonably Foreseeable Hypothetical Scenario</u>	184
(2) <u>The Fit and Appropriate Sentence for the Offender in the Second Reasonably Foreseeable Hypothetical Scenario</u>	201
(3) <u>The Difference Between the Fit and Appropriate Sentences for the Offenders in the Reasonably Foreseeable Hypothetical Scenarios and the Minimum Term of Imprisonment Provided for in Section 172.1(2)(a) Cr. C. Is Not Grossly Disproportionate</u>	212
(a) <i>The Offence of Child Luring Is Broad in Scope but Always Involves Conduct With a High Degree of Moral Blameworthiness as Well as Harm or a Risk of Harm</i>	212
(b) <i>The Effects of the Minimum Term of Imprisonment on the Offenders in the Reasonably Foreseeable Hypothetical Scenarios Are Not Incompatible With Human Dignity</i>	222
(c) <i>The Minimum Term of Imprisonment Is Not Grossly Disproportionate to What Is Necessary to Achieve Parliament's Objectives</i>	226
III. <u>Conclusion</u>	231
I. <u>Overview</u>	

[175] Sexual violence against children is an evil that afflicts our society and deprives its victims of the childhood to which they were entitled by exposing them to various forms of serious harm that can interfere with their development and self-fulfillment (*R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 58). Like concentric circles, the harm caused by the commission of such offences affects not only the children who are the immediate victims of the offences but also their families, their communities and, ultimately, society as a whole, which “is diminished and degraded” (*Friesen*, at paras. 62-64, quoting *R. v. Hajar*, 2016 ABCA 222, [2016] 12 W.W.R. 435, at para. 67).

[176] The criminalization of sexual violence against minors attests to the cardinal importance that Canada attaches to the protection of its children (*R. v. L. (J.-J.)* (1998), 126 C.C.C. (3d) 235 (Que. C.A.), at p. 250), which is one of the most fundamental values of Canadian society (*Friesen*, at para. 65). As this Court noted in *Friesen*, “the criminal law in general and sentencing law specifically are important mechanisms that Parliament has chosen to employ to protect children from sexual violence” (para. 45). Further, sentencing is a way for our society to express, through the courts, its abhorrence of such offences, which encroach on the system of values shared by all Canadians (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81).

[177] In this regard, Parliament decided, through the enactment of s. 718.01 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), to prioritize the objectives of denunciation and deterrence in the sentencing process for such offences. It also chose

to increase the maximum sentences for offences of this kind, thereby recognizing “the profound harm . . . cause[d]” by such conduct (*Friesen*, at para. 95). Lastly, Parliament decided, in some cases, to enact mandatory minimum sentences. Notably, it did so for the offence of child luring in s. 172.1 *Cr. C.*, which provides for a minimum term of imprisonment of six months or one year, depending on whether the Crown proceeds summarily or by indictment. In these appeals, this Court must determine whether these minimum terms of imprisonment are cruel and unusual within the meaning of s. 12 of the *Canadian Charter of Rights and Freedoms*.

[178] In addressing this issue, it is important to keep in mind that there is no constitutional provision that protects against the imposition of a disproportionate punishment; s. 12 of the *Charter* protects against the imposition of a *grossly disproportionate* punishment. Proportionality is certainly an essential principle of sentencing. However, this principle has not been constitutionalized (*R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 71; *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 169). As this Court explained in *Safarzadeh-Markhali*, “[t]he principles and purposes for determining a fit sentence, enumerated in s. 718 of the *Criminal Code* and provisions that follow — including the fundamental principle of proportionality in s. 718.1 — do not have constitutional status” (para. 71). Indeed, “Parliament is entitled to modify and abrogate them as it sees fit, subject only to s. 12 of the *Charter*” (para. 71; see also *R. v. Bissonnette*, 2022 SCC 23, at paras. 52-53).

[179] The standard of gross disproportionality “is intended to be demanding and will be attained only rarely” (*Bissonnette*, at para. 70 (emphasis added), citing, among others, *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 45). Accordingly, showing that a sentence is demonstrably unfit, or even excessive, is not sufficient (*Boudreault*, at para. 45; *R. v. Hills*, 2023 SCC 2, at paras. 113-14). To be grossly disproportionate, a minimum sentence must be “so excessive as to outrage standards of decency” and “‘abhorrent or intolerable’ to society” (*R. v. Lloyd*, 2016 SCC 13, [2016] S.C.R. 130, at para. 24). By setting such a high bar, courts ensure that the necessary deference is shown to Parliament’s public policy choices with regard to sentencing (*Hills*, at para. 113). With respect, my colleague’s reasons completely erode such deference.

[180] In light of this Court’s recent pronouncements in *Friesen* and the high standard that applies in an analysis under s. 12 of the *Charter*, I cannot conclude that sentencing an offender to imprisonment for six months or one year for communicating with a minor for the purpose of facilitating the commission of a sexual offence or other specified offence against the minor is one of the instances in which the demanding and “rarely” attained standard of gross disproportionality is met.

[181] Consequently, unlike my colleague, I am of the view that the mandatory minimum sentences provided for in s. 172.1(2)(a) and (b) *Cr. C.* are not contrary to s. 12 of the *Charter*. I agree with my colleague’s disposition with regard to the sentence to be imposed on Mr. Bertrand Marchand. However, I would set aside the four-month

sentence given to H.V. and impose the mandatory minimum sentence of six months' imprisonment. Since the Crown conceded in oral argument that reincarceration is not necessary in the circumstances, I would order a permanent stay of execution of the modified sentence.

II. Analysis

Section 172.1(2) Cr. C. Does Not Violate Section 12 of the Charter

[182] The analytical framework that must be applied under s. 12 of the *Charter* consists of two stages. At the first stage, “the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*” (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 46). At the second stage, the court must decide “whether the mandatory punishment is grossly disproportionate when compared to the fit sentence for either the claimant or for a reasonable hypothetical offender” (*Boudreault*, at para. 46, citing *Nur*, at paras. 46 and 77). This “requires a contextual comparison between the fit sentence and the impugned mandatory minimum to see whether the latter complies with the widely-worded right set out in s. 12” (*Hills*, at para. 45). To do so, the court must consider (1) the scope and reach of the offence, (2) the effects of the penalty on the offender, and (3) the penalty itself, including the balance struck by its objectives (*Hills*, at para. 122).

[183] In the present appeals, my colleague finds that the imposition of minimum terms of imprisonment on Mr. Bertrand Marchand and H.V. is not cruel and unusual. However, she declares the impugned provisions unconstitutional on the basis of two hypothetical scenarios that she considers reasonably foreseeable. It is therefore appropriate to analyze the constitutionality of the mandatory minimum sentences provided for in s. 172.1(2)(a) and (b) in light of these two scenarios.

(1) The Fit and Appropriate Sentence for the Offender in the First Reasonably Foreseeable Hypothetical Scenario

[184] The first hypothetical scenario identified by my colleague is based on the one proposed in *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269. Drawing on the Court of Appeal's reasoning in that case, my colleague sets out the following reasonably foreseeable hypothetical scenario (para. 116):

- The representative offender is a first-year high school teacher in her late 20s with no criminal record. The offender has been diagnosed with bipolar disorder. One evening, she texts her 15-year-old student to inquire about a school assignment. Feeling manic, she directs the conversation from casual to sexual. The two meet that same evening in a private location where they both participate in sexual touching. The offender does not engage inappropriately with the student on any further occasions. The offender pleads guilty and expresses remorse on sentencing. See *Hood*, at para. 150.

[185] In this regard, my disagreement with my colleague relates mainly to the sentence that she considers fit and appropriate for this offender. With respect, a 30-day

term of imprisonment to be served intermittently is far too lenient a sentence having regard to the gravity of the offence and the moral blameworthiness of the offender.

[186] In *Friesen*, this Court called on courts to impose more severe sentences on offenders who have committed sexual offences against children. It also found that the successive increases in maximum sentences indicated Parliament's intention that these offences be treated as more grave and that the sentences imposed for them therefore be higher than they had been in the past (paras. 99-100). The message sent by this Court was unequivocal: "Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large" (para. 5).

[187] Without establishing a sentencing range, the Court made some comments concerning the factors that courts must consider in determining a fit and appropriate sentence for offences of this kind: (i) any manner of physical sexual contact between an adult and a child is inherently violent and harmful (para. 82); (ii) in child luring cases where all interactions occur online, the offender's conduct can constitute a form of psychological sexual violence that has the potential to cause serious harm (para. 82); (iii) it is important to give effect to Parliament's clear and repeated signals to increase the sentences imposed for sexual offences against children (para. 100). In this regard, courts should generally impose higher sentences than those imposed in cases that preceded the increases in maximum sentences (para. 100). With respect, although my

colleague emphasizes the principles set out in *Friesen*, the approach she uses to determine the fit and appropriate sentence is inconsistent with that decision.

[188] Indeed, despite her statement to the contrary, my colleague treats the absence of grooming and premeditation as mitigating. She first points out that the offender's actions were spontaneous and of short duration rather than premeditated and calculated. While she acknowledges that these circumstances are not in themselves mitigating, she nevertheless concludes that they "provide insight into the overall gravity of the offence and culpability of the offender" (para. 127). She adds, at para. 127, that "[i]t is well established that spontaneous or spur of the moment crimes should be punished less severely than planned or premeditated ones (see, e.g., *R. v. Laberge* (1995), 165 A.R. 375 (C.A.), at para. 18; *R. v. Murphy*, 2014 ABCA 409, 593 A.R. 60, at para. 42; *R. v. Vienneau*, 2015 ONCA 898, at para. 12 (CanLII))". I agree that, "all other things being equal, impulsivity is less blameworthy than planned or repeated conduct" (*Laberge*, at para. 18 (emphasis added)). In *Laberge*, Fraser C.J. specified, however, that the fact that an act was committed spontaneously does not automatically lead to the conclusion that the accused had no subjective intent to act and that the conduct in question is therefore less blameworthy: "[the existence of such an intent] depends on a constellation of factors and not simply on the degree of planning that went into the unlawful act" (para. 20). Thus, "even in the case of impulsive acts, other factors in the context must be examined to determine whether there really is a low level of culpability" (C. C. Ruby, *Sentencing* (10th ed. 2020), at p. 252, citing *Laberge*).

[189] However, *the absence* of grooming and premeditation must have a neutral effect on sentencing (*R. v. S.R.*, 2008 QCCA 2359, at para. 18 (CanLII); *R. v. Barrett*, 2013 QCCA 1351, at paras. 24-25 (CanLII); *R. v. D.B.*, 2013 QCCA 2199, at para. 13 (CanLII); *R. v. S.J.B.*, 2018 MBCA 62, at paras. 19-20 (CanLII); H. Parent and J. Desrosiers, *Traité de droit criminel*, t. III, *La peine* (3rd ed. 2020), at p. 98). I find it difficult to understand how a neutral factor can provide insight into the gravity of the crime and the moral blameworthiness of the offender. If this is the case, it must be because the factor is seen, wrongly, as mitigating. Giving a *de facto* mitigating effect to a neutral factor amounts, in my view, to underestimating the subjective gravity of the offence.

[190] The offender's conduct in this hypothetical scenario is highly blameworthy. Teachers are presumed to be in a relationship of trust with their students and in a position of authority toward them (*R. v. Audet*, [1996] 2 S.C.R. 171, at paras. 41-43). It is difficult to imagine a more demanding task than the one resting on them, that is, to ensure the well-being, safety and education of our children (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 1; *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 84). When parents entrust their children to a school, they delegate part of their parental authority to the teaching staff working there “and entrust them with the responsibility of instilling in their children a large part of the store of learning they will acquire during their development” (*Audet*, at para. 41; on the power dependency relationships inherent in a student-teacher relationship, see also P. Coleman, “Sex in Power Dependency Relationships: Taking Unfair Advantage of the ‘Fair’ Sex” (1988),

53 *Alb. L. Rev.* 95, at pp. 120-21, cited in *Audet*, at para. 40). In discharging this heavy responsibility, teachers may not abuse the authority they exercise over their students to gratify their sexual desires. Such sexual interference involves heightened levels of exploitation (*Hajar*, at para. 232, per Slatter J.A., dissenting).

[191] A teacher who disregards this moral and social duty and engages in such conduct is committing a very serious act that has deleterious social effects. Indeed, such behaviour has the potential to undermine and erode public confidence in the school system, because “[t]he conduct of a teacher bears directly upon the community’s perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community’s confidence in the public school system as a whole” (*Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 43).

[192] More immediately, the commission of such acts is likely to have devastating consequences for the child victims, consequences that are glossed over in my colleague’s analysis. Yet this Court recognized in *Friesen* that “sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case” (para. 76). In light of this, the Court instructed lower courts to *always* “take into account forms of potential harm that have yet to materialize at the time of sentencing but that are a reasonably foreseeable consequence of the offence and may in fact materialize later in childhood or in adulthood” (para. 84). During childhood, these forms of harm may include

... overly compliant behaviour and an intense need to please; self-destructive behaviour, such as suicide, self-mutilation, chemical abuse, and prostitution; loss of patience and frequent temper tantrums; acting out aggressive behaviour and frustration; sexually aggressive behaviour; an inability to make friends and non-participation in school activities; guilty feelings and shame; a lack of trust, particularly with significant others; low self-esteem; an inability to concentrate in school and a sudden drop in school performance; an extraordinary fear of males; running away from home; sleep disturbances and nightmares; regressive behaviours, such as bedwetting, clinging behaviour, thumb sucking, and baby talk; anxiety and extreme levels of fear; and depression.

(C.-A. Bauman, "The Sentencing of Sexual Offences against Children" (1998), 17 *C.R.* (5th) 352, at pp. 354-55, quoted in *Friesen*, at para. 80.)

[193] In the long run, the consequences of sexual violence may impair the ability of child victims to form emotional relationships with another adult. They may make these children, when they reach adulthood, more prone to engage in sexual violence themselves against other children or make them more likely to "struggle with substance abuse, mental illness, post-traumatic stress disorder, eating disorders, suicidal ideation, self-harming behaviour, anxiety, depression, sleep disturbances, anger, hostility, and poor self-esteem as adults" (*Friesen*, at para. 81).

[194] In the case of the offender in my colleague's first hypothetical scenario, this harm is all the more serious given the fact that the commission of the offence involves abuse of a position of trust and authority (*Friesen*, at para. 126). This is why an "offender who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child" (*Friesen*, at para. 130).

[195] My colleague is of the view that rehabilitation “must be prioritized for this offender” (para. 129), which runs counter to the very wording of s. 718.01 *Cr. C.*, the constitutionality of which is not being challenged here. It is important to remember that this section makes it necessary to “prioritize denunciation and deterrence for offences that involve the abuse of children” (*Friesen*, at para. 101; see also *R. v. Rayo*, 2018 QCCA 824, at para. 103 (CanLII)). Let me be clear: in these circumstances, my colleague cannot prioritize another penological objective, as that is the role of Parliament. Although my colleague makes reference to s. 718.01 *Cr. C.*, there is nothing in her reasons to indicate that [TRANSLATION] “the relative precedence of [the] objectives [set out in s. 718.01 *Cr. C.*] will be clear” in the sentence she would impose on the offender in her hypothetical scenario (*Rayo*, at para. 112; see also *R. v. Bergeron*, 2016 QCCA 339, at para. 32 (CanLII)).

[196] It is true that courts “must not magnify aggravating factors or narrow mitigating ones to reach desired conclusions” (Martin J.’s reasons, at para. 122). But conversely, mitigating factors cannot be overestimated at the expense of aggravating circumstances in order to achieve a certain outcome. I find that a nine-month term of imprisonment is a fit and appropriate sentence for the offender in the first hypothetical scenario.

[197] In *Rayo*, which was rendered in 2018, the Quebec Court of Appeal noted that the sentencing range for the offence of child luring is between 12 and 24 months when the offence is prosecuted by indictment (paras. 125-26). I note that such a range

was proposed in 2006, well before the 2012 and 2015 legislative amendments introducing the minimum sentences challenged in this case (*R. v. Jarvis* (2006), 211 C.C.C. (3d) 20 (Ont. C.A.), at para. 31). In *Montour v. R.*, 2020 QCCA 1648, the Court of Appeal indicated that this range could be revised upwards as a result of *Friesen* (paras. 55-60 (CanLII)). Similarly, in *Traité de droit criminel*, Parent and Desrosiers state that the general sentencing range is from 6 to 24 months' imprisonment. According to them, short prison sentences range from 6 to 12 months (pp. 869-72), intermediate sentences from 9 to 18 months (pp. 872-76), and longer sentences from 18 months to 5 years (pp. 876-77). Generally, offences in the intermediate category involve a mix of aggravating and mitigating circumstances (p. 874). Mitigating circumstances that have been identified include a guilty plea, the expression of remorse and a low risk of reoffending (p. 874). Aggravating factors include the exploitation of a relationship of trust and of the victim's vulnerability for the purpose of having sexual relations with the victim (pp. 874-75, citing *Rayo*, at para. 29). In addition, [TRANSLATION] "where luring gives rise to related offences involving the actual assault of a child, the global sentences are generally more significant" (*Rayo*, at para. 171; see also *Hajar*, at para. 156).

[198] A review of the case law also shows that 12-month terms of imprisonment have been imposed for child luring offences committed in a context involving abuse of a position of trust (see, e.g., *R. v. Faille*, 2021 QCCQ 4945; *R. v. Jissink*, 2021 ABQB 102, 482 C.R.R. (2d) 167). In *Faille*, a 12-month term of imprisonment for child luring was imposed on a teacher who had conversations with the victim during which he

frequently talked about sex and drug and alcohol use. He then tried to contact the victim by web video, which she refused, and he later sent her a photograph of a sexual nature. The judge found abuse of a position of trust to be an aggravating factor, noting that [TRANSLATION] “it was as a teacher, and thus a known figure, that [the accused] established ties with the two victims” (para. 57 (CanLII)), which is also the case in the scenario being considered. A guilty plea and the absence of a criminal record were mitigating factors.

[199] In *Jissink*, a teacher pleaded guilty to one count of child luring for having sent sexually explicit messages to a 16-year-old student. In that case, the Court of Queen’s Bench imposed a one-year term of imprisonment even though the communications had never led to a meeting for sexual purposes between the offender and the complainant. The aggravating factors considered by the court included the significant age difference between the offender and the victim as well as abuse of a position of trust and authority because of the offender’s status as a teacher. In that case, which involved circumstances analogous to the scenario being considered here, the court noted that a sentence of 12 months’ imprisonment “is on par with sentences imposed on similar offenders for similar offences committed in similar circumstances” (para. 77).

[200] In the scenario being considered, an offender takes advantage of her status as a teacher to exploit a 15-year-old child for sexual purposes. This is a “classic breach of trust situatio[n]” that increases the offender’s moral blameworthiness (*Friesen*, at

paras. 126 and 129). A nine-month term of imprisonment takes into account the moral blameworthiness inherent in an offence like child luring, the abuse of a position of trust and the commission of an underlying offence. It also takes into account the significant age difference between the offender and the complainant as well as the complainant's vulnerability. Nevertheless, I am of the view that such a penalty acknowledges the role that the offender's mental illness played in the events, along with her guilty plea and the remorse she expressed.

(2) The Fit and Appropriate Sentence for the Offender in the Second Reasonably Foreseeable Hypothetical Scenario

[201] My colleague proposes a second reasonably foreseeable hypothetical scenario to assess the constitutionality of the six-month minimum term of imprisonment provided for in s. 172.1(2)(b) *Cr. C.* (para. 119):

- The representative offender is an 18-year-old who is in a romantic and sexual relationship with a 17-year-old. In one text, the offender asks her to send him an explicit photo. She does, and he then forwards that photo to his friend without his girlfriend's knowledge. This friend, who is also 18, does not transmit this photo to anyone, but retains it on his mobile phone. See [*R. v.*] *John*, [2018 ONCA 702, 142 O.R. (3d) 670,] at para. 29.

[202] This hypothetical scenario is based on a scenario considered by the Ontario Court of Appeal in *John*, in which that court declared the minimum sentence provided for in s. 163.1(4)(a) *Cr. C.* for possession of child pornography unconstitutional.

[203] In my colleague's opinion, the fit and appropriate punishment for this offender is a conditional discharge (para. 130). Again, I cannot agree with that position.

[204] It is true that, as a general rule, there is no offence for which a discharge is unavailable "other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life" (s. 730(1) *Cr. C.*). However, in the case of offences committed against a child or an intimate partner, [TRANSLATION] "it will be more difficult to grant a discharge" (Parent and Desrosiers, at p. 305 (footnote omitted); see also *Medvedev v. R.*, 2013 QCCA 540, at para. 4 (CanLII)). The jurisprudence also establishes that a conditional discharge is rarely granted in cases involving domestic violence (Parent and Desrosiers, at pp. 305-8; *R. v. Laurendeau*, 2007 QCCA 1593, at paras. 18-19 (CanLII)). This is so because the sentence imposed in such cases must align with two imperatives, [TRANSLATION] "[t]hat of denouncing the unacceptable and criminal nature of domestic violence and that of increasing the confidence of victims and the public in the administration of justice" (*Laurendeau*, at para. 19; see also *R. v. Davidson*, 2021 QCCA 545, at paras. 32 and 34 (CanLII)).

[205] In this second hypothetical scenario, the offender was in a romantic relationship with the victim at the time of the offence. However, the conditional discharge proposed by my colleague fails to take into account s. 718.2(a)(ii) *Cr. C.*, which provides that the commission of an offence that involved the abuse of the offender's intimate partner is an aggravating circumstance. In this context, the

objectives of denunciation and deterrence must be prioritized in sentencing (*R. v. Cunningham*, 2023 ONCA 36, 166 O.R. (3d) 147, at paras. 26 and 52; *Davidson*, at paras. 32 and 34). Not only did the offender engage in conduct that involved the abuse of his intimate partner, but he also committed that offence against a minor, and both of these factors increase the subjective gravity of the offence.

[206] Added to this is another aggravating circumstance, namely the fact that the offender abused a position of trust in relation to the complainant (s. 718.2(a)(iii) *Cr. C.*), who was entitled to expect that her sexually explicit photo would be for the exclusive use of her boyfriend. Trust is an intrinsic part of any romantic relationship (*R. v. Stone*, [1999] 2 S.C.R. 290, at para. 240; *R. v. Butcher*, 2020 NSCA 50, 387 C.C.C. (3d) 417, at para. 140). Taking advantage of the existence of such a relationship of trust to deceive one's girlfriend is "likely to increase the harm to the victim and thus the gravity of the offence" (*Friesen*, at para. 126).

[207] The hypothetical offender's actions could have many negative consequences for the complainant. These include not only humiliation and shame but also a violation of her sexual integrity and her interests in personal autonomy, dignity and privacy (*Friesen*, at paras. 51 and 152; J. Bailey and C. Mathen, "Technology-Facilitated Violence Against Women & Girls: Assessing the Canadian Criminal Law Response" (2019), 97 *Can. Bar Rev.* 664, at p. 677). Moreover, the fact that the offence was committed through technological means amplifies the potential harm given the ease with which the photo can be redistributed by the same means to a

theoretically unlimited audience. Once the photo has been transmitted without the complainant's consent, she loses all control over its future dissemination, which exponentially increases her psychological harm and potential emotional suffering (Bailey and Mathen, at pp. 676-77). Finally, the offender's actions involved the abuse of an adolescent girl, and the vulnerability of adolescent girls to sexual violence has been recognized (*Friesen*, at para. 136).

[208] I acknowledge that the hypothetical offender is young and has no criminal record. However, I cannot give these factors the weight given to them by my colleague in light of the above-mentioned aggravating factors. Indeed, I cannot subscribe to the view that in all cases involving a youthful first offender, “[r]ehabilitation and individual deterrence are primary sentencing objectives” (para. 132). First of all, the decisions cited in support of that view are more nuanced. In *R. v. Priest* (1996), 30 O.R. (3d) 538, the Ontario Court of Appeal held that the fact that a youthful offender has no criminal record is a mitigating factor and that the sentencing objectives in such a case should normally be individual deterrence and rehabilitation. In the same breath, however, the Court of Appeal stated that rehabilitation is not a paramount factor for serious offences or offences involving violence (pp. 543-45; see also *R. v. Tan*, 2008 ONCA 574, 268 O.A.C. 385, at para. 32; *R. v. T. (K.)*, 2008 ONCA 91, 89 O.R. (3d) 99, at paras. 41-42, decisions that are also cited by my colleague and are to the same effect). The weight to be given to the offender's age therefore depends on the nature of the offence of which the offender is convicted. The same is true for the weight to be given to the absence of a criminal record (*R. v. Ahmed*, 2017 ONCA 76, 136 O.R. (3d) 403, at para. 65, citing

T. (K.), at paras. 41-42; *R. v. Brown*, 2015 ONCA 361, 126 O.R. (3d) 797, at para. 5; and *R. v. Khalid*, 2010 ONCA 861, 103 O.R. (3d) 600, at para. 43).

[209] At the risk of repeating myself, in cases involving sexual violence against a minor, rehabilitation simply cannot be prioritized. Rather, Parliament's choice, expressed in s. 718.01 *Cr. C.*, to prioritize denunciation and deterrence must be given full effect. As this Court explained in *Friesen*, "[w]here Parliament has indicated which sentencing objectives are to receive priority in certain cases, the sentencing judge's discretion is thereby limited, such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority" (para. 104, citing *Rayo*, at paras. 103 and 107-8; see also *Lévesque v. R.*, 2021 QCCA 1072, at paras. 19-20 (CanLII); *Davidson*, at paras. 32 and 34; *Cunningham*, at paras. 26 and 52).

[210] The offender's conduct in this hypothetical scenario is at the lower end of the scale of gravity for the offence, since it involves an isolated act committed by an 18-year-old with no criminal record (see *Parent and Desrosiers*, at pp. 869-71). I note once more that short sentences for the offence of child luring ranged from 6 to 12 months (*Parent and Desrosiers*, at p. 869), and this was so even before the 6-month minimum term of imprisonment in s. 172.1(2)(b) *Cr. C.* was introduced (*R. v. Bergeron*, 2013 QCCA 7, at para. 75 (CanLII)). In short, having regard to the circumstances set out above and the general sentencing range, the fit and appropriate punishment is not a conditional discharge but rather a six-month term of imprisonment.

[211] Given that, for both reasonably foreseeable hypothetical scenarios, I conclude that the fit and appropriate sentence is equal to or greater than a six-month term of imprisonment, this decides the constitutionality of s. 172.1(2)(b) *Cr. C.* The following analysis therefore concerns the constitutionality of the one-year minimum term of imprisonment set out in s. 172.1(2)(a).

(3) The Difference Between the Fit and Appropriate Sentences for the Offenders in the Reasonably Foreseeable Hypothetical Scenarios and the Minimum Term of Imprisonment Provided for in Section 172.1(2)(a) *Cr. C.* Is Not Grossly Disproportionate

(a) *The Offence of Child Luring Is Broad in Scope but Always Involves Conduct With a High Degree of Moral Blameworthiness as Well as Harm or a Risk of Harm*

[212] In my colleague's opinion, the *mens rea* required for the offence of child luring "is not narrow but broad", such that s. 172.1(1) *Cr. C.* "captures a wide range of designated illicit purposes with varying degrees of moral culpability" (para. 139). It is true that when an offence carrying a mandatory minimum sentence can be committed in a way that involves a low degree of moral blameworthiness and no harm or real risk of harm, this indicates that the minimum sentence may be grossly disproportionate (see, e.g., *Nur*, at para. 83, cited in *Hills*, at para. 125). However, this is not the case for the offence of child luring, which involves conduct that is always morally blameworthy and that always involves harm or a risk of harm.

[213] To begin with, I agree that s. 172.1(1) applies to a wide range of situations (*R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at paras. 146-48). In spite of this, I am of the view that the offence of child luring always involves a high degree of moral blameworthiness. As was recognized by Moldaver J., writing for a majority of this Court in *Morrison*, luring “requires a high level of *mens rea* and involves a high degree of moral blameworthiness” (para. 153). This is so because s. 172.1(1) *Cr. C.* requires proof beyond a reasonable doubt that “the accused . . . ‘engage[d] in the prohibited communication with the specific intent of facilitating the commission of one of the designated offences’ with respect to the underage person who was the intended recipient of communication” (*R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, at para. 32 (emphasis deleted), quoting *R. v. Alicandro*, 2009 ONCA 133, 246 C.C.C. (3d) 1, at para. 31). Consequently, requiring proof of such a *mens rea* “helps to ensure that innocent communication will not be unintentionally captured by the *Code*” (para. 35).

[214] I therefore fail to see the relevance of my colleague’s assertion that “[b]ecause proof of facilitation does not necessarily include proof of complex planning, the luring offence can capture conduct that is bereft of sophistication or considered intention” (para. 145). With respect, this amounts to conflating the existence of aggravating circumstances with the constituent elements of an offence. Sophistication and premeditation are certainly aggravating factors, but they are not essential elements of the offence. For the purposes of the analysis under s. 12 of the *Charter*, these factors tell us nothing about the scope of an offence.

[215] This error illustrates a fundamental conceptual flaw in such reasoning. In the section of her reasons that deals with the scope of the offence, my colleague does not limit herself to an objective analysis that involves “consider[ing] whether the offence necessarily involves harm to a person or simply the risk of harm, whether there are ways of committing the offence that pose relatively little danger, and to what degree the offence’s *mens rea* requires an elevated degree of culpability of the offender” (*Hills*, at para. 129). Rather, she assesses the scope of the offence in question in light of circumstances relating to the degree of subjective fault of a particular offender, irrespective of the inherent wrongfulness of the offence (*Friesen*, at para. 76).

[216] In addition, one must be careful not to emphasize the fact that it is not necessary for the offender to have committed one of the underlying offences listed in s. 172.1(1) in order to be convicted of child luring (Martin J.’s reasons, at para. 143). I would also note that the underlying offences are serious offences that criminalize the sexual abuse, trafficking or abduction of children. If s. 172.1(1) casts a wide net, it is because Parliament’s objective was to “close the cyberspace door before the predator gets in to prey” (*Legare*, at para. 25). In keeping with this objective, s. 172.1(1) “criminalizes conduct that precedes the commission of the sexual offences to which it refers, and even an attempt to commit them” (*Legare*, at para. 25 (emphasis deleted)).

[217] In the same vein, in analyzing the constitutionality of s. 172.1(2) *Cr. C.*, I cannot assign the weight my colleague does to the fact that the offence of child luring

may be committed in the context of a police sting operation that does not involve children (para. 142).

[218] Even when the offence of luring is committed in the context of a police operation, it involves conduct that is undeniably very serious. An offender charged as a result of a police sting cannot rely on the absence of a victim to demonstrate lower moral blameworthiness:

Courts must give effect to the moral culpability of the offender in sentencing even where the facts giving rise to the conviction involve a police sting operation rather than a child victim. Child luring may be committed in two ways: the offender is actually communicating with an underage person, or the offender believes the person he is communicating with is under age even though this is not in fact the case. In particular, the offence of child luring is often prosecuted through sting operations: an undercover officer poses online as a child and waits for an offender to initiate communication with a sexual purpose (see, e.g., *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3, at para. 7; *Morrison*, at para. 4). Although the absence of a specific victim is relevant, it should not be overemphasized in arriving at a fit sentence. The accused can take no credit for this factor. As such, it does not detract from the degree of responsibility of the offender for that offence. After all, to be convicted of child luring in the context of a police sting operation where the person the offender was communicating with was not in fact under age, the offender both must have intentionally communicated with a person who the offender believed to be under age and must have had the specific intent to facilitate the commission of a sexual or other specified offence against that person (*Morrison*, at para. 153). [Emphasis added; footnote omitted.]

(*Friesen*, at para. 93)

[219] It must be remembered that even when child luring is committed in the context of a police operation, it must never be seen “as a victimless crime” (*Friesen*, at para. 94).

[220] It is difficult to claim that the conduct of an offender arrested as a result of a sting operation poses no risk of harm. Parliament designed the offence of child luring precisely to prevent such a risk from materializing, that is, to apprehend “offenders before they can successfully target and harm children” (*Friesen*, at para. 94). In this sense, police operations are a key element in the arsenal available to law enforcement agencies to apprehend offenders before it is too late (para. 94).

[221] In short, requiring a high level of *mens rea* ensures that the offence of child luring captures only conduct that involves a high degree of moral blameworthiness as well as serious harm or a risk of such harm (*Friesen*, at para. 76).

(b) *The Effects of the Minimum Term of Imprisonment on the Offenders in the Reasonably Foreseeable Hypothetical Scenarios Are Not Incompatible With Human Dignity*

[222] In addition to the scope of the offence, the grossly disproportionate nature of a mandatory minimum sentence is assessed in light of the effects that the penalty may have on the reasonably foreseeable offender (*Hills*, at para. 133). If these effects entail so much pain and suffering that they undermine human dignity, the impugned provision cannot survive constitutional scrutiny (para. 133). That is not the case here.

[223] For both of the hypothetical offenders, the effects identified by my colleague relate to the treatment they might receive in prison. It seems that imprisonment itself — and not its length — is what plays a major role in her analysis. Although my colleague refrains from concluding that the effects in question, which, I

might add, are inherent to incarceration, are such as to undermine human dignity, she nevertheless finds that the first offender's individual circumstances "would likely make her experience of incarceration perilously grave" (para. 151) and that, for the second offender, "[t]he six-month mandatory minimum in this case is a far cry from the shortest possible rehabilitative sentence" (para. 152). Such reasoning has major implications; its logical consequence is that any minimum term of imprisonment that may be imposed on an offender who has just reached adulthood or on a person with a mental illness will be grossly disproportionate, regardless of the gravity of the offence or the circumstances surrounding its commission. Such an outcome seems to me to be entirely inconsistent with the deference owed to Parliament. Indeed, "if few mandatory minimums can survive the scrutiny exemplified in [my colleague's] reasons on s. 12, then one must question what role is left for Parliament's legitimate policy choices in setting punishment" (*Lloyd*, at para. 107, per Wagner J. (as he then was), Gascon and Brown JJ., dissenting).

[224] In any event, as explained above, I conclude that a nine-month term of imprisonment would be fit and appropriate for the offender in the first hypothetical scenario and that a six-month term of imprisonment is a fit and appropriate punishment in the second hypothetical scenario. In the first case, the imposition of the mandatory minimum sentence provided for in s. 172.1(2)(a) results in an additional period of imprisonment of three months. In the second case, the application of s. 172.1(2) *Cr. C.* would therefore result in an additional six months' imprisonment if the offence were prosecuted by indictment.

[225] I cannot bring myself to conclude that any additional period of imprisonment has effects that are incompatible with human dignity, because this would amount to indirectly introducing a standard of proportionality. I wish to make one important clarification. My remarks should not be taken to mean that, once incarceration is found to be the fit and appropriate punishment, any additional period of imprisonment is immune from constitutional scrutiny because the offender in question already has to deal with the negative effects associated with imprisonment. In this case, however, there is nothing in the record that allows me to identify “the precise harm associated” with this additional period of imprisonment (*Hills*, at para. 133). Nevertheless, since the period is relatively short, I am of the view that its effects are not incompatible with human dignity.

(c) *The Minimum Term of Imprisonment Is Not Grossly Disproportionate to What Is Necessary To Achieve Parliament’s Objectives*

[226] The final stage of the analysis is meant to determine whether the minimum sentence “goes beyond what is necessary to achieve Parliament’s sentencing objectives relevant to the offence” (*Hills*, at para. 138). In this inquiry, courts must consider “the legitimate purposes of punishment and the adequacy of possible alternatives” (*Hills*, at para. 138, quoting *R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1099-1100). However, it is essential to bear in mind at this stage that gross disproportionality is the constitutional standard that applies in the analysis under s. 12 of the *Charter*. I reiterate this because, in my opinion, my colleague’s reasoning transforms the standard of gross disproportionality into one of proportionality.

[227] This shift in her analysis can first be seen at para. 158, where she argues that, for offenders whose mental illness contributed to the commission of an offence, “specific deterrence, general deterrence and denunciation are of little use”. With respect, this argument misses the mark.

[228] It is not for this Court to question the appropriateness or usefulness of the penological objectives set by Parliament. The Court’s role at this stage of the analysis — and indeed the role of any court tasked with assessing the constitutionality of a mandatory minimum sentence — is to determine whether the punishment goes so far beyond what is necessary to “achieve Parliament’s sentencing objectives relevant to the offence” (*Hills*, at para. 138 (emphasis added)) that it is grossly disproportionate. The distinction is a subtle but very important one. Otherwise, courts are stepping into a role that is — and must remain — exclusive to Parliament, namely that of assessing the utility of means of responding to social problems (*Malmo-Levine*, at para. 177; *Lloyd*, at para. 45). I note that the question is not whether Parliament chose the least restrictive means to achieve its objectives, an inquiry more akin to the one made in the context of applying s. 1 of the *Charter* than to the scrutiny required under s. 12.

[229] With respect, I am of the view that the shift continues in the following paragraph of my colleague’s reasons, where she writes that the imposition of a minimum term of imprisonment of 6 or 12 months undermines the principle of proportionality and indicates that “Parliament has prioritized denunciation and deterrence to the near complete exclusion of rehabilitation” (para. 159 (emphasis

added)). But Parliament is perfectly at liberty to do so, provided that it leaves a door open for rehabilitation “even in cases where this objective is of minimal importance” (*Hills*, at paras. 141-42, quoting *Bissonnette*, at para. 85). It has not been shown here how, by creating minimum terms of imprisonment of six months and one year in s. 172.1(2) *Cr. C.*, Parliament has completely excluded this objective.

[230] There is a difference of three months (for the offender in the first hypothetical scenario) or six months (for the offender in the second hypothetical scenario) between the fit and appropriate sentence and the sentence provided for in s. 172.1(2)(a) *Cr. C.* In my opinion, this difference is not so great as to show that the punishment chosen by Parliament grossly exceeds what is necessary to achieve its objectives of deterrence and denunciation of sexual violence against children. Perhaps there is some disproportion the application of which leads to a demonstrably unfit punishment, but this is not sufficient to declare s. 172.1(2)(a) and (b) *Cr. C.* unconstitutional.

III. Conclusion

[231] In summary, the reasonably foreseeable hypothetical scenarios discussed by my colleague do not persuade me that the minimum sentences provided for in s. 172.1(2) *Cr. C.* are grossly disproportionate. In view of the gravity of this offence, the fact that its scope is clearly circumscribed by the high level of *mens rea* required, the morally blameworthy and extremely harmful conduct targeted by the offence of child luring, and the deference owed to Parliament’s public policy decisions with regard

to sentencing, I am of the view that the impugned mandatory minimum sentences are not contrary to s. 12 of the *Charter*.

[232] Accordingly, I would allow the appeal of the Attorney General of Quebec and the Crown in Mr. Bertrand Marchand's case. I would set aside the Quebec Court of Appeal's declaration that s. 172.1(2)(a) *Cr. C.* is of no force or effect, and I would declare that the one-year minimum term of imprisonment provided for in that section is constitutional. For the reasons given by my colleague, I would set aside the sentence of five months' imprisonment imposed on March 11, 2020, on the count of child luring, and I would impose on Mr. Bertrand Marchand a one-year term of imprisonment on that count, to be served consecutively to his term of imprisonment for sexual interference. I would order a permanent stay of execution of the modified sentence. I would also allow the appeal of the Attorney General of Quebec and the Crown in H.V.'s case. I would set aside the Quebec Superior Court's declaration that s. 172.1(2)(b) *Cr. C.* is invalid and of no force or effect, and I would declare that the six-month minimum term of imprisonment provided for in that section is constitutional. Consequently, I would set aside the sentence imposed on H.V. on February 25, 2021, and I would impose the mandatory minimum sentence of six months' imprisonment on him. I would order a permanent stay of execution of the modified sentence.

Appeal allowed in part, CÔTÉ J. dissenting in part (39935). Appeal dismissed, CÔTÉ J. dissenting (40093).

Solicitor for the appellant His Majesty The King (39935): Director of Criminal and Penal Prosecutions, Montréal.

Solicitor for the appellant His Majesty The King (40093): Director of Criminal and Penal Prosecutions, Saint-Jérôme.

Solicitors for the appellant the Attorney General of Quebec (39935): Bernard, Roy (Justice Québec), Montréal; Ministère de la Justice du Québec — Direction du droit constitutionnel et autochtone, Québec.

Solicitors for the appellant the Attorney General of Quebec (40093): Ministère de la Justice du Québec — Direction du contentieux, Montréal; Ministère de la Justice du Québec — Direction du droit constitutionnel et autochtone, Québec.

Solicitor for the respondent Maxime Bertrand Marchand: Centre Communautaire juridique d'Alma, Alma.

Solicitors for the respondent H.V.: Desjardins Côté, Montréal.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Montréal.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Crown Law Office — Criminal, Toronto.

*Solicitor for the intervener the Attorney General of Saskatchewan:
Attorney General of Saskatchewan, Regina.*

*Solicitor for the intervener the Attorney General of Alberta: Alberta Crown
Prosecution Service — Appeals and Specialized Prosecutions Office, Calgary.*

*Solicitor for the intervener the Nunavik Civil Liberties Association:
Christine Renaud, Montréal.*

*Solicitor for the intervener Association québécoise des avocats et avocates
de la défense: Hugo Caissy Avocat (ad hoc), Amqui, Que.*

*Solicitors for the intervener the Barbra Schlifer Commemorative Clinic:
Chugh Law Professional Corporation, Cornwall.*

*Solicitors for the intervener Association des avocats de la défense de
Montréal: Réginal Victorin, Montréal; Walid Hijazi, Montréal.*

*Solicitors for the intervener the Independent Criminal Defence Advocacy
Society: Peck and Company, Vancouver.*