Unofficial English Translation of the Judgment of the Court

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| R. c. Bertrand Marchand | | | | | 2021 QCCA 1285 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | QUÉBEC | | |
| No.: | 200-10-003751-208 | | | | |
| (610-01-006950-160) | | | | | |
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| DATE: | AUGUST 24, 2021 | | | | |
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| CORAM: | | THE HONOURABLE | | JACQUES J. LEVESQUE, J.A.  GENEVIÈVE COTNAM, J.A.  MICHEL BEAUPRÉ, J.A. | |
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| HER MAJESTY THE QUEEN | | | | | |
| APPLICANT – Prosecutrix | | | | | |
| and | | | | | |
| ATTORNEY GENERAL OF QUEBEC | | | | | |
| Applicant – Impleaded party | | | | | |
| v. | | | | | |
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| MAXIME BERTRAND MARCHAND | | | | | |
| RESPONDENT – Accused | | | | | |
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| JUDGMENT | | | | | |
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**Warning: Order restricting publication – sexual offences: Any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way (s. 486.4(1) *Cr. C*.).**

1. The applicants seek leave to appeal from the portion of the judgment rendered by the Court of Québec, Criminal and Penal Division, District of Témiscamingue, on March 11, 2020 (the Honourable Marie-Claude Bélanger), sentencing the respondent to five months’ imprisonment for luring a person who is, or who the accused believed to be, under the age of 16 years (s. 172.1(1)(*b*)(2)(*a*) *Cr. C*.) (count 4), to be served concurrently with count 1,[[1]](#footnote-1) as well as the judge’s decision to declare inoperative the mandatory minimum sentence set out in s. 172(2)(*a*) *Cr. C*. which, according to her, violates s. 12 of the *Canadian Charter of Rights and Freedoms*.
2. For the joint reasons of Cotnam and Beaupré, JJ.A., **THE COURT**:
3. **GRANTS** the application for leave to appeal;
4. **DISMISSES** the appeal;
5. **DECLARES** that the minimum sentence set out at s. 172.1(2)(*a*) violates the *Canadian Charter of Rights and Freedoms* in the case of the respondent and that it is inoperative with respect to him.
6. Levesque, J.A., would have granted the application for leave to appeal, allowed the appeal, set aside the sentence of 5 months’ imprisonment ordered on March 11, 2020, with respect to count 4, set aside the declaration of inoperability made by the trial judge, sentenced Maxime Bertrand Marchand to 12 months’ imprisonment on count 4 to be served concurrently with the sentence of 10 months’ imprisonment ordered for count 1, permanently suspend the sentence thus imposed on the respondent, and modified paragraph 87 of the judgment under appeal so that the probation order described therein would be for a period of 3 years starting on March 11, 2020.

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|  | | JACQUES J. LEVESQUE, J.A. |
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|  | | GENEVIÈVE COTNAM, J.A. |
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|  | | MICHEL BEAUPRÉ, J.A. |
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| Mtre Mélissa Plante | | |
| Director of Criminal and Penal Prosecutions | | |
| For the applicant, Her Majesty The Queen | | |
|  | | |
| Mtre Pierre Rogué | | |
| Bernard, Roy | | |
| For the applicant, the Attorney General of Québec | | |
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| Mtre Samuel Bérubé de Deus | | |
| Cliche Matte | | |
| Counsel for Respondent | | |
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| Date of hearing: | November 18, 2020 | |

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| REASONS OF LÉVESQUE, J.A. |
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I have had the benefit of reading the joint reasons of my colleagues Cotnam and Beaupré, JJ.A. Respectfully, I cannot share their point of view or agree with their proposed solution.

Here are the reasons, therefore, justifying the conclusion I propose.

**. . .**

1. The applicants seek leave to appeal from a judgment rendered by the Court of Québec, Criminal and Penal Division, District of Témiscamingue, on March 11, 2020 (the Honourable Marie-Claude Bélanger), sentencing the respondent to 10 months’ imprisonment for sexual interference (s. 151(*a*) *Cr. C.* (count 1) and 5 months’ imprisonment for luring a person who is, or who the accused believed to be, under the age of 16 years (s. 172.1(1)(*b*)(2)(*a*) *Cr. C*.) (count 4) to be served concurrently with count 1.[[2]](#footnote-2)
2. The trial judge also declared inoperative the mandatory minimum sentence set out in s. 172(2)(*a*) *Cr. C*. which, according to her, violates s. 12 of the *Canadian Charter of Rights and Freedoms*.[[3]](#footnote-3)
3. The information was sworn and signed on January 22, 2016, and contains four counts:
4. Between August 1, 2013, and July 19, 2015, in Notre-Dame-du-Nord, District of Témiscamingue, did, for a sexual purpose, touch a part of the body of X (2000-[…]), a child under the age of sixteen (16) years, thereby committing the indictable offence set out in section 151(*a*) of the *Criminal Code.*
5. Between August 1, 2013, and July 19, 2016, in Notre-Dame-du-Nord, District of Témiscamingue, did, for a sexual purpose, invite, counsel or incite X (2000-[…]), a child under the age of sixteen (16) years, to touch him, thereby committing the indictable offence set out in section 152(*a*) of the *Criminal Code*.
6. Between August 1, 2013, and July 19, 2015, in Notre-Dame-du-Nord, District of Témiscamingue, did sexually assault X (2000-[…]), thereby committing the indictable offence set out in section 271(*a*) of the *Criminal Code*.
7. Between February 25, 2015, and September 13, 2015, in Notre-Dame-du-Nord, District of Témiscamingue, by means of telecommunication, did communicate with X, a person who was, or who the accused believed was, under the age of 16 years, for the purpose of facilitating the commission of an offence against her under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280, thereby committing the indictable offence set out in ss. 172.1(1)(*b*) and (2)(*a*) of the *Criminal Code*.
8. On August 29, 2017, a few months after the preliminary inquiry where he was ordered to stand trial, the respondent pleaded guilty to counts 1 (sexual interference between August 1, 2013, and July 19, 2015) and 4 (luring a child between February 25, 2015 and September 13, 2015). The preparation of a pre-sentence report was then ordered.
9. On November 27, 2017, when the report was submitted, the respondent stated that he intended to argue the constitutional invalidity of the mandatory minimum sentences set out in ss. 151(*a*) and 172.1(2)(*a*) *Cr. C*.[[4]](#footnote-4)
10. Submissions on sentencing and the application on constitutional invalidity were postponed a few times and were finally heard on July 12, November 4, and December 17, 2019. The judge imposed the sentence on March 11, 2020.
11. On April 14, 2020, the applicants sought leave to appeal from the sentence imposed on the respondent and the declaration of inoperability.[[5]](#footnote-5) On May 8, 2020, a judge of this Court referred that application to the panel.[[6]](#footnote-6)

# BACKGROUND

1. There is little dispute about the relevant facts of this case. The applicants refer the Court to paragraphs 15 to 28 and 68 of the judgment under appeal, whereas the respondent invites us to consider paragraphs 1 to 28 and 38 to 72 of that judgment. I believe it is advisable to cite the following paragraphs:[[7]](#footnote-7)

[translation]

[15] Bertrand Marchand and the complainant met at the Truck Rodeo in Notre-Dame-du-Nord in early August 2013, through mutual friends. Over the course of the following weeks, the offender contacted her through Facebook and sent her a friend request, which she accepted. At the beginning of their conversations, the complainant told him that she was 13 years old.

[16] During these exchanges, the offender incited her to come visit him at his parent’s home in late August 2013. He went to pick her up while she was visiting her mother’s home in City A. They had consensual sexual intercourse for the first time during this encounter.

[17] Shortly after this first visit, they met a second time at the home of the offender’s parent’s, where they again had consensual sexual intercourse. The complainant also performed fellatio on him.

[18] In the fall of 2014, the complainant, who was 14 at the time, was placed in Rehabilitation Centre A. In November, she was supposed to take the bus to return to the centre after a weekend visit to a foster family in City B. However, she and the offender agreed that she would get off the bus in Notre-Dame-du-Nord so that they could spend time together. Mr. Bertrand Marchand promised to drive her to the centre. On the way to City A, the offender stopped on a road and he and the complainant had consensual sexual intercourse in the backseat of the car. She arrived at the rehabilitation centre late.

[19] In July 2015, the complainant was still living in the rehabilitation centre during the week. After a weekend with her foster family, she again agreed to get off the bus on her way back to the centre and to accompany Bertrand Marchand to his home for one hour to have sexual intercourse. The plan was set in motion and they had sexual intercourse with penetration. The complainant also performed fellatio on him during which the offender ejaculated in her mouth. The offender again drove the complainant to the rehabilitation centre afterwards. She was 15 years old at the time; he was 24.

[20] Their exchanges on Facebook diminished in August 2015 and stopped entirely on September 11, 2015. The complainant made her statement to the Sûreté du Québec investigator on September 10, 2015.

…

[38] Bertrand Marchand, who is nine years older than the complainant, had complete vaginal sexual intercourse with her four times over a period of about two years. He maintained an online relationship with her through social media, punctuated by sporadic physical encounters organized through these electronic conversations, the purpose of which was essentially to have sexual encounters.

…

[43] ... The offender took advantage of the adolescent’s naivety and vulnerability to obtain occasional sexual favours when the situation allowed him to do so.

[44] The Sûreté du Québec’s cybersurveillance team recovered part of the conversations between Bertrand Marchand and the complainant from the Facebook site, dated between December 7, 2014, and September 23, 2015. These are the conversations from the last nine months of their relationship, which lasted about two years. According to the admissions of fact and the accepted evidence, three of the four sexual episodes had already taken place at the point when the copy of these conversations starts. The conversations are relevant to analyzing the nature of their relationship and the types of conversations that led to the last sexual episode in July 2015.

…

[49] A reading of these conversations also reveals that Bertrand Marchand was aware of the illegality of his relationship with the adolescent and the risk he was running of facing charges for committing the acts. He nevertheless continued having conversations that had sexual overtones with her. He also asked her for compromising photos on Snapchat and organized encounters with her. He was often the one to request that they meet up. The Court has identified about 18 conversations where he asked her to come see him, suggesting that he go meet her or that they meet somewhere so he could see her and bring her back to the centre himself after a visit to her mother’s home or with the foster family in City B.

…

[53] From the evidence as a whole, the Court accepts that the offender initiated the first contact between the complainant and himself through a Facebook friend request following a chance meeting through mutual friends. He quickly learned that she was only 13 years old and therefore nine years younger than he was. He nevertheless continued their conversations. He was well aware of the illegality of their sexual relationship, but continued to seek it out.

…

[59] Although there was no specific evidence concerning the consequences of the crime on the complainant, the Court concludes that it had a significant impact on her. From the beginning of the communications filed under exhibit S-4, she said that the only reason the offender was staying in contact with her was to have sexual intercourse. In certain passages from the conversations, she says she feels used and exploited and she lets him know it. It was the reason she finally ended their relationship in August or September 2015. This type of relationship based on manipulation to satisfy sexual needs with a still-developing adolescent undoubtedly leaves scars. The specific situation of X, who was already dealing with challenges that led to the intervention of the Director of Youth Protection, exacerbates the difficulties that can be related to these events.

[60] In short, this is a situation of sexual exploitation by an individual who is nine years older than the complainant and who wanted to take advantage of this young adolescent’s naivety and vulnerability to obtain occasional sexual favours when the circumstances allowed. This situation is not similar to the facts in *Jomphe* and *Caron Barrette*, cited by the offender, where the prohibited sexual acts were committed in the context of a consensual romantic relationship that had the approval and support of the young girls’ parents.

[61] Taking into account the offender’s age, his personal situation, his lack of prior convictions, his guilty plea, and the particular circumstances of the case described above, the Court finds that a sentence of 10 months’ imprisonment on the count of sexual interference is appropriate.

…

[63] In all likelihood, the count of luring was brought following the discovery of the Facebook conversations between the two protagonists, filed under exhibit S‑4. It targets the offender’s many propositions contained in that document to meet the complainant to have sexual relations.

[64] This is not a classic case of a sexual predator who goes on the Internet to find a young victim and facilitate the commission of sexual offences. Given the dates stated in the charge, what the offender is specifically being accused of is having used a means of telecommunication to organize and facilitate sexual encounters with her, which had already been ongoing for a year and a half.

…

[67] … In the Court’s opinion, the means used by the offender to communicate with X reveal a generational choice rather than a means specifically chosen to anonymously browse various websites searching for a young victim or to enter into contact with a young person for the purpose of eventually obtaining sexual favours.

[68] In the period covered by the charge, the offender offered to meet the complainant around 18 times, as stated above. She hesitated and agreed to some meetings before cancelling them. She worried about the potential consequences if their escapades were uncovered and she shared her worries with him. He ignored her uneasiness, often repeating his requests. He accused her of [translation] “bailing” a few times.

…

[70] Although these communications were made for the purpose of facilitating the commission of sexual offences against a person under the age of 16 years, the acts committed by the offender do not constitute preparatory grooming of the adolescent for the purpose of lowering her inhibitions and convincing her to participate in sexual activities. She had already consented to such activities three times. They are instead repeated attempts, through the use of electronic conversations, to have sexual intercourse with her again, made in the specific context of a young vulnerable girl who was under the Director of Youth Protection’s care.

[71] The Court is of the view that a sentence of 5 months’ imprisonment is appropriate in the circumstances.

…

[78] ... The 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.

[79] Although I entirely agree with the Court of Appeal’s analysis in *Rayo*, I believe that the facts of the specific situation in this case do not lead to the same conclusions. The distinct social interest that luring aims to protect in nearly every situation is not present here, given the specific circumstances of this case. The luring charged against Mr. Bertrand Marchand does not concern the premeditated seduction of the adolescent for the purpose of gaining her trust and eventually leading her to consent to sexual activity. It is instead repeated communications for the purpose of convincing her to meet with him to have sexual intercourse again. These circumstances convince me that the offence of luring committed by Mr. Bertrand Marchand is closely linked to the sexual interference and that the sentences for these two offences should be served concurrently.

[Citations omitted.]

# THE JUDGMENT UNDER APPEAL

1. The judge noted that the respondent pleaded guilty to sexual interference and luring a person under the age of 16 years. She summarized the positions of the parties on the appropriate sentence. The Crown suggested 2 years less a day (12 to 15 months’ imprisonment for luring and 12 months for sexual interference, to be served consecutively). The respondent considered that a total sentence of 90 days’ imprisonment served intermittently was appropriate. This meant that the minimum sentence for the offence of luring should be considered cruel and unusual punishment, in violation of s. 12 of the *Charter*.[[8]](#footnote-8)
2. Because the respondent contested the minimum sentence for the offence of luring, the judge, as was right, first analyzed the just and appropriate sentence to impose on him. Relying on ss. 718 *et seq*. *Cr. C.,* she noted that the total sentence must be proportionate to the gravity of the offence and the respondent’s degree of responsibility. She recalled the importance of denouncing and deterring sexual offences committed against children or adolescents.[[9]](#footnote-9)
3. From the evidence adduced, the judge accepted the following elements in particular: the age difference between the respondent and the victim (nine years), full sexual intercourse on four occasions[[10]](#footnote-10) over a period of two years, and the maintenance of a virtual relationship through social networks for the basic purpose of having sexual encounters. She found that the respondent took advantage of the adolescent’s naivety and vulnerability to obtain occasional sexual favours, even though he knew that the victim was under the authority of the Director of Youth Protection. She was of the opinion that it was a situation of sexual exploitation. Considering the age of the offender, his personal situation, his lack of prior convictions, his guilty plea, and the particular circumstances of the case, the judge determined that a sentence of 10 months’ imprisonment on the count of sexual interference was appropriate.[[11]](#footnote-11)
4. With respect to the count of luring, the judge first found that the guilty plea did not cover the period when the sexual acts began (August 2013), but only the period between February 25, 2015, and September 13, 2015. In the judge’s opinion, this is not a classic case of luring but rather the use of a means of telecommunication to organize and facilitate sexual encounters with the victim. She thought it right to assert that the use of Facebook is a generational choice. The judge noted that a single encounter occurred during the period covered by the indictment. Since the victim had already [translation] “consented” three times to sexual intercourse, the acts committed by the respondent cannot be seen as preparatory grooming. She was of the opinion that the appropriate sentence was five months’ imprisonment, while taking care to specify that it would have been different had the respondent pleaded guilty before the commission of the first sexual interference.[[12]](#footnote-12)
5. The judge then determined that the sentences should be concurrent, not consecutive. She did not apply s. 718.3(4)(*b*) *Cr. C*. and s. 163.1 *Cr. C.* because the case did not meet the criteria. She distinguished this case from *Rayo*[[13]](#footnote-13) because the sexual acts started before the short period connected with the offence of luring.The luring in this case aimed to convince the victim, through repeated communications, to agree to have sexual relations with him again. That being the case, the offence of luring is closely linked to the sexual interference.[[14]](#footnote-14)
6. This is how she concluded that a total sentence of 5 months’ imprisonment was just, reasonable, and proportionate to the gravity of the offender’s actions.
7. The judge then questioned whether the mandatory minimum sentence was “grossly disproportionate”. Because she was of the opinion that the fit sentence was a term of imprisonment of 5 months, the judge found that a public well informed of the circumstances of the matter would be outraged to see the respondent sentenced to 12 months’ imprisonment.
8. The judge therefore declared that the minimum sentence for the offence of luring violated s. 12 the *Canadian Charter of Rights and Freedoms* in the respondent’s case and that it is inoperative with respect to him.[[15]](#footnote-15) She wrote:

[translation]

[82] Since the appropriate sentence for the offence of luring committed by the offender is 5 months’ imprisonment, the mandatory minimum sentence of 1 year of imprisonment consequently appears entirely disproportionate when applied to him. The Court considers that a public well informed of all the circumstances of this matter would be outraged to see Mr. Bertrand Marchand sentenced to 12 month’s imprisonment for this offence. The subjective gravity of this offence, in the circumstances of this matter, does not call for a sentence as harsh as those normally required for this type of offence.[[16]](#footnote-16)

# GROUNDS OF APPEAL

1. The applicants essentially argue that the judge committed errors in principle by incorrectly considering certain mitigating factors and by limiting the scope of the offence of luring. According to them, these errors had a significant effect on the sentence, such that the sentence is demonstrably unfit. They consider that the judge was also mistaken in not ordering consecutive sentences for the counts of luring and sexual interference. They also argue that the judge erred in her assessment and application of the test to determine whether s. 12 of the *Charter* applies, and that she erred in law in declaring inoperative the mandatory minimum sentence of 1 year under s. 172.1(2)(*a*) *Cr. C*.
2. The respondent suggests that the judge exercised her discretionary power in a reasonable manner and that there is no overriding error or any error of law.

# STANDARD OF REVIEW

1. *Lacasse*[[17]](#footnote-17)and *Friesen*[[18]](#footnote-18) crystallized the standard of review of an appellate court in sentencing.Deference is required and intervention will be justified only if it is established that a sentence is demonstrably unfit or if the judge committed an error in principle that had an impact on the sentence imposed.
2. While this case also concerns determining the appropriate sentence in the context of a constitutional challenge, this analysis is no different than the one conducted where no such challenge exists.[[19]](#footnote-19) In reviewing the sentence, therefore, the Court must avoid substituting its opinion for that of the trial judge simply because it would have imposed a different sentence or because it would have weighed the relevant factors differently.[[20]](#footnote-20)

# ANALYSIS

## 5.1 Did the judge err by incorrectly considering certain mitigating factors and by limiting the scope of the offence of luring, thereby rendering the sentence demonstrably unfit?

1. I believe that it is important to note at the outset that the trial judge did not have the benefit of the teachings of *Friesen*[[21]](#footnote-21) when she rendered her sentencing judgment on March 11, 2020. *Friesen* urges judges and appellate courts to consider, among other things, “Parliament’s legislative initiatives” and “the profound harm” that sexual offences cause young persons who are its victims.[[22]](#footnote-22) The Supreme Court proposes imposing higher sentences to give effect to Parliament’s clear and repeated signals.[[23]](#footnote-23) The applicants therefore criticize the trial judge for committing errors in principle that had a determinative effect on her decision to declare inoperative the minimum sentence of 1 year prescribed under s. 172.1(2)(*a*) *Cr. C*. and to impose a final sentence of 5 months’ imprisonment, which she considered just and appropriate in the circumstances she had identified.
2. By pleading guilty to the offence of luring, the respondent acknowledged that, between February 25, 2015, and September 13, 2015, he wilfully communicated with a person he knew was a minor and that he had the specific intention of facilitating the commission of a sexual offence or another designated offence with respect to that person.[[24]](#footnote-24)
3. I am of the view that the trial judge unduly minimized the objective gravity of the offence to which the respondent pleaded guilty and that she diminished the subjective gravity of the offence by considering that several instances of sexual relations had already taken place without the victim’s objection. That is an error in principle. Among other things, the trial judge wrote:

[translation]

[38] Bertrand Marchand, who is nine years older than the complainant, had complete vaginal sexual intercourse with her four times over a period of about two years. He maintained an online relationship with her through social media, punctuated by sporadic physical encounters organized during these electronic conversations, the purpose of which was essentially to have sexual encounters.[[25]](#footnote-25)

1. The conversations of the respondent and the victim held between February 27, 2015, and September 13, 2015, through telecommunication, exhibit S-4, were not filed in the record. The judge, however, clearly refers to them at paragraphs 44 to 54 of her judgment, which state:

[translation]

[49] A reading of the these conversations also reveals that Bertrand Marchand was aware of the illegality of his relationship with the adolescent and the risk he was running of facing charges for committing the acts. He nevertheless continued having conversations that had sexual overtones with her. He also asked her for compromising photos on Snapchat and organized encounters with her. He was often the one to request that they meet up. The Court has identified about 18 conversations where he asked her to come see him, suggesting that he go meet her or that they meet somewhere so he could see her and bring her back to the centre himself after a visit to her mother’s home or with the foster family in City B.

[50] … On several occasions, she refused meetings or cancelled them for fear that her educator would find out about her escapades and impose negative consequences on her.

…

[52] Two days earlier, when they were discussing organizing a rendezvous, she had asked him to buy alcohol, telling him that she needed three or four [translation] “then I feel good. I feel slutty hahaha”. An hour and a half before they were supposed to meet, the adolescent asked him to buy alcohol. He told her that he would go buy alcoholic beverages and asked her if he would be entitled to a bonus for this. She said no. He told her that he had bought two cans of “Mojo” and told her that she should be tipsy after drinking them.

…

[54] The evidence also reveals that the offender was well aware of the adolescent’s vulnerability. He took advantage of this condition to maintain their connection and arrange sexual encounters to satisfy his needs.[[26]](#footnote-26)

1. The judge also noted that:

[translation]

[59] Although there was no specific evidence on the consequences of the crime on the complainant, the Court concludes that it had a significant impact on her. From the beginning of the communications filed under exhibit S-4, she said that the only reason the offender was staying in contact with her was to have sexual intercourse. In certain passages from the conversations, she says she feels used and exploited and she lets him know it. This was why she finally ended their relationship in August or September 2015. This type of relationship based on manipulation to satisfy sexual needs with a still-developing adolescent undoubtedly leaves scars. The particular situation of X, who was already dealing with challenges that led to the intervention of the Director of Youth Protection, exacerbates the difficulties that can be related to these events.[[27]](#footnote-27)

1. She was nevertheless of the view that:

[translation]

[64] This is not a classic case of a sexual predator who goes on the Internet to find a young victim and facilitate the commission of sexual offences. Given the dates stated in the charge, what the offender is specifically being accused of is having used a means of telecommunication to organize and facilitate sexual encounters with her, which had already been ongoing for a year and a half.

[65] ... were 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.[[28]](#footnote-28)

1. And concluded that:

[translation]

[67] ... In the Court’s opinion, the means used by the offender to communicate with X reveal a generational choice rather than a means specifically chosen to anonymously browse various websites searching for a young victim or to enter into contact with a young person for the purpose of eventually obtaining sexual favours.[[29]](#footnote-29)

1. Moreover:

[translation]

[70] Although these communications were made for the purpose of facilitating the commission of sexual offences against a person under the age of 16 years, the acts committed by the offender do not constitute preparatory grooming of the adolescent for the purpose of lowering her inhibitions and convincing her to participate in sexual activities. She had already consented to such activities three times. They are instead repeated attempts, through the use of electronic conversations, to have sexual intercourse with her again, made in the specific context of a young vulnerable girl who was under the Director of Youth Protection’s care.[[30]](#footnote-30)

1. The parties’ submissions on sentencing indicate that the victim had been placed in a rehabilitation centre for a period of eight months, starting in April 2015.[[31]](#footnote-31) The respondent’s testimony during the hearing on December 17, 2019, established that he even communicated with the victim in 2017 using Tinder, despite it being prohibited: [translation] “Because I knew that she was in love with me and she had not forgotten me, and she sent me a request on Facebook, and after that she came to talk to me, so...”.[[32]](#footnote-32)
2. These observations emerging from the evidence and from the respondent’s own admission support the conclusion that the respondent knowingly and more specifically because of the strong dependence and great vulnerability of the victim 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 solely for the selfish purpose of satisfying his sexual impulses.
3. I cannot accept that the offence of luring a child must be limited solely to communications that preceded the sexual assault or sexual interference. This very vulnerable young person was the victim of manipulation between February 2015 and September 2015, through the defendant’s increased contact with her. This manipulation establishes, without a shadow of a doubt, that all of this had no purpose other than to facilitate another sexual offence against the victim.[[33]](#footnote-33) The sole purpose of the respondent’s communications with the victim by a means of telecommunication was to maintain and build the relationship of trust that existed between them.
4. The Supreme Court clearly set out the applicable principle in such situations when it wrote:

[153] Third, in some cases, a victim’s participation is the result of a campaign of grooming by the offender or of a breach of an existing relationship of trust. In no case should the victim’s participation be considered a mitigating factor. Where a breach of trust or grooming led to the participation, that should properly be seen as an aggravating factor (*R. v. P.M.* (2002), 155 O.A.C. 242, at para. 19; *R. v. F. (G.C.)* (2004), 71 O.R. (3d) 771 (C.A.), at paras. 7 and 21; *Woodward*, at para. 43). Adolescence can be a confusing and challenging time for young people as they grow and mature, navigate friendships and peer groups, and discover their sexuality. As Feldman J.A. wrote in *P.M.,* to exploit young teenagers during this period by leading them to believe that they are in a love relationship with an adult “reveals a level of amorality that is of great concern” (para. 19).[[34]](#footnote-34)

1. In *Rayo*,[[35]](#footnote-35) Kasirer, J.A., as he then was, recalled that a term of 12 months’ imprisonment is generally imposed for the offence of luring. But for the errors in principle noted, the trial judge certainly would not have concluded that the just sentence, proportionate to the gravity of the offence and the degree of responsibility of the offender, was 5 months’ imprisonment to be served concurrently with 10 months’ imprisonment for the count of sexual touching.
2. The parties did not see fit to file into the appeal record the pre-sentence report filed in the Court of Québec on November 20, 2017. It is, however, possible to gather from the judgment under appeal (paragraphs 21 to 28) and from the parties’ submissions during the sentencing hearing that this report was hardly favourable to the respondent. Here is what the Crown prosecutor stated at the hearing of December 17, 2019:

[translation]

What the officer is saying is that he benefited from a positive family environment in which there were no psychosocial issues.

At page 5 of the report, the officer states that the accused’s sexual development appears conventional, that the relationship he had with S. was an impersonal one in which there was no emotional commitment.

The officer who prepared the report states that she was able to identify other signs of impersonal sexual activities. She reports a significant number of sexual partners and the accused’s use of the Internet to facilitate encounters with potential sexual partners. This is on page 5.

These facts here, the fact that the accused did not necessarily want a commitment and that he had some... so it was more an impersonal context, this also appears from the messages that the accused sent to the young girl.

On page 6, the officer states that the personal, ... in fact, his personal desire, of the accused, led him to obliterate the inherent obstacles, that is, those related to the victim’s age and the illegality of the act. So, she also states that the acts were facilitated by the victim’s consent.

There is an important fact also in the report which is that the officer states that the accused assigned importance to the gratification of his sexual needs and that his choice of partners is truly led by this desire for gratification. This is on page 6.[[36]](#footnote-36)

1. Although certain factors specific to the respondent[[37]](#footnote-37) may suggest that rehabilitation should be an important objective of his sentence, the fact nevertheless remains that, in the specific context of this case, the objectives of deterrence and denunciation should be prioritized. The victim’s young age and her great vulnerability in her situation, well known to the respondent, justified a sentence of 12 months’ imprisonment. The judgment under appeal does not address the principles regarding the impact of the acts committed on the health, security, and dignity of the young victim.[[38]](#footnote-38)

**Concurrent or consecutive sentences**

1. It is well established that the sentencing judge has broad discretion to impose a consecutive or a concurrent sentence. The standard of review on appeal is high: a court of appeal must show the same deference it uses when assessing the sentence.[[39]](#footnote-39)
2. In *Rayo*, Kasirer, J.A. explained clearly that the offence of luring pursues a different and more specific societal interest – protecting children from cyberspace, where they are particularly vulnerable and unsupervised – than the interests that are protected by the related offences. That being the case, imposing consecutive sentences is generally justified.[[40]](#footnote-40)
3. In the judge’s opinion, the luring conducted by the respondent was not a period of preparatory grooming, but repeated communications for the purpose of convincing the victim to have sexual intercourse with him again.[[41]](#footnote-41)
4. With respect, I find this reasoning erroneous. Certainly, the indictment includes only the period from February to September 2015, which coincides with the numerous conversations on Facebook. Given the particular context of this case, the judge should have nevertheless considered the events that took place before the period covered by the indictment to establish the exact nature and planning of the luring.[[42]](#footnote-42) The grooming was continuous, and the victim was even incited to have sexual relations with the respondent in July 2015. The judge even noted that this was a [translation] “situation of sexual exploitation”, which reinforces the idea that the sentences should have been consecutive.[[43]](#footnote-43)
5. I am, however, of the opinion that a term of imprisonment of 12 months served consecutively to the sentence of 10 months imposed for sexual interference would be excessive, considering the particular circumstances of this case, the specific characteristics of the respondent, and his moral blameworthiness.
6. In light of the totality principle in sentencing, [[44]](#footnote-44) therefore, I propose that the just and appropriate sentence in the circumstances is 12 months’ imprisonment, to be served concurrently with the sentence imposed for the count of sexual interference, also considering in particular that these two offences are, on the facts of this case, closely related.

# A suspended sentence

1. At the hearing, this Court was informed that the respondent has served his 10‑month sentence in full on the count of sexual touching. The attorneys also confirmed that he was paroled on July 30, 2020.
2. It must therefore be recognized that, because the sentence for luring was concurrent, the respondent has served the 5 months’ of imprisonment imposed by the trial judgment, as well as 10/12 of the sentence that I believe is appropriate. The respondent should therefore serve 2 additional months’ detention.
3. I am of the opinion, however, that it would be unjust and abusive for the respondent to submit to such an obligation.[[45]](#footnote-45) Indeed, the applicants astonishingly decided not to appeal the sentence of 10 months’ imprisonment that had already been served. They therefore acknowledge that it was a just and appropriate sentence.
4. This Court recently had the opportunity to consider a similar situation.[[46]](#footnote-46)
5. Ultimately, the issue is whether the ends of justice would be properly served by re‑incarcerating the offender. In *Davidson*, the Court thought it appropriate to suspend the sentence for its remainder and increase the length of the probation order.
6. It is worth recalling that the sentences for sexual interference and luring were imposed on March 11, 2020. The probation order imposed extended over a period of 2 years.
7. I believe it is therefore appropriate to suspend the sentence of 12 months for the offence of luring a child and to modify paragraph 87 of the judgment under appeal solely so that the probation order specified therein be for a period of 3 years instead of 2 years, starting on the date of sentencing, that is, March 11, 2020.

## Did the judge err in her assessment and application of the test under s. 12 of the Charter and, incidentally, in declaring inoperative the mandatory minimum sentence of one year set out in s. 172.1(2)(a) Cr. C.?

1. Having arrived at the conclusion that the appropriate sentence that is proportionate to the respondent’s moral blameworthiness, in light of the circumstances of the case and the offender’s characteristics, is a period of 12 months’ imprisonment to be served concurrently with all other sentences, it must be concluded that this term of imprisonment cannot be characterized as “grossly disproportionate” and as “so excessive as to outrage standards of decency and abhorrent or intolerable to society”.[[47]](#footnote-47)
2. Because the first step of the test proposed by the Supreme Court in *Nur* has been completed, it is appropriateto move on to the second step and ask “whether the provision’s reasonably foreseeable applications will impose grossly disproportionate sentences on others?”[[48]](#footnote-48)
3. In *Caron Barrette*, this Court described the task to be completed as follows:

[translation]

[73] If that is not the case, reasonably foreseeable applications should be examined. In *Nur*, McLachlin C.J. reconsidered this concept and stated that a reasonable hypothetical must be based on “a situation that may reasonably be expected to arise”, and not on situations that are marginally imaginable or that have little resemblance to the case before the court nor on fanciful or speculative situations. The question is therefore whether it is reasonably foreseeable that the minimum sentence could be grossly disproportionate for certain persons..

[74] In the context of this analysis, it is relevant to refer to the case law, which illustrates the range of real-life conduct captured by the offence. The hypothetical offender’s characteristics are also relevant to the debate. However, the Supreme Court warns us not to confer on the offender personal features that would construct the most sympathetic case imaginable.

[75] If, after having examined the reasonably foreseeable situations, the judge concludes that they will impose grossly disproportionate sentences on other persons, this means that the minimum sentence violates s. 12 of the *Charter*.[[49]](#footnote-49)

1. McLachlin, C.J., recalled the principle of judicial deference respecting the constitutionality of a minimum sentence, when she wrote in *R. v. Lloyd*:[[50]](#footnote-50)

[18] To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide.

1. At trial, the respondent submitted a few hypothetical situations that were useful to his arguments, including those arising from *R. v. Morrison*[[51]](#footnote-51) and *R. v. Hood*,[[52]](#footnote-52)to which he added *Caron Barrette*, just discussed above.
2. The applicants invite this Court to exercise judicial deference with respect to these hypothetical situations raised by the respondent.
3. I share this opinion. The reasonable hypothetical applications alleged based on these judgments are of very little assistance to the constitutional debate before this Court.
4. The Supreme Court did not rule on the issue of sentencing in *Morrison* and it ordered a new trial.In the case of Ms. Hood, the Nova Scotia Court of Appeal overturned the trial judgment. The judgment of this Court in *Caron Barrette* was connected to a specific situation related to s. 151 *Cr. C*.
5. In this context, I believe it is preferable that I not rule on the issue, as this Court suggested in *Ibrahim*.[[53]](#footnote-53)
6. All this being said, I propose to:

* grant the application for leave to appeal;
* allow the appeal;
* set aside the sentence of five months’ imprisonment imposed on March 11, 2020, on count 4;
* set aside the trial judge’s declaration of inoperability;
* sentence Maxime Bertrand Marchand to 12 months’ imprisonment on count 4, to be served concurrently with the sentence of 10 months’ imprisonment established on count 1;
* permanently suspend the sentence thus imposed on the respondent;
* modify paragraph 87 of the judgment under appeal so that the probation order described therein is for a period of 3 years, starting on March 11, 2020.

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| JACQUES J. LEVESQUE, J.A. |

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| REASONS OF COTNAM AND BEAUPRÉ, JJ.A. |
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1. On August 28, 2017, the respondent pleaded guilty to one count of sexual touching committed against a person under the age of 16 years[[54]](#footnote-54) between August 1, 2013, and July 19, 2015. Over the course of that period, he and the complainant had full sexual intercourse on four occasions. He also pleaded guilty to one count of luring in connection to conversations he had with the complainant through social networks between February 25, 2015, and September 13, 2015.[[55]](#footnote-55)
2. On March 11, 2020, the Court of Québec, Criminal and Penal Division, District of Témiscamingue (the Honourable Marie-Claude Bélanger), sentenced the respondent to 10 months’ imprisonment on the count of sexual touching and 5 months’ imprisonment to be served concurrently on the count of luring. The judge concluded moreover that the mandatory minimum sentence of 1 year of imprisonment under s. 172.1(2)(*a*) *Cr. C.* for the offence of luring is disproportionate, given the circumstances of its commission in this case and the personal circumstances of the respondent, and that it therefore violated s. 12 of the *Charter*. Accordingly, she declared it inoperative with respect to the respondent.[[56]](#footnote-56)
3. The Crown and the Attorney General of Quebec’s application for leave to appeal solely from the sentence of 5 months’ imprisonment for the offence of luring and from the declaration that the minimum sentence was inoperative was referred to the panel. The applicants essentially argue that the judge erred in fact and in law, as well as on questions of principle:
4. in determining the quantum of the sentence for the offence of luring, because a sentence of 5 months is demonstrably unfit in the circumstances;
5. in not ordering that the sentence on the count of luring be served consecutively to that of 10 months for sexual touching;
6. in concluding that the mandatory minimum sentence of 1 year of imprisonment under s. 172.1(2)(*a*) *Cr. C.* for the offence of luring is grossly disproportionate in the circumstances, and in declaring that provision inoperative with respect to the respondent under s. 12 of the *Charter*.
7. We would grant the application for leave to appeal, on the one hand, and dismiss the appeal, on the other.
8. During the hearing, counsel confirmed that the respondent started serving his sentence the day it was rendered and that he has been on parole since July 30, 2020.

\* \* \* \* \*

1. In his reasons, our colleague has provided a detailed outline of the context described by the trial judge and the conclusions she drew therefrom. There is no need to revisit it, subject to certain elements that will be discussed further below in the analysis section. Considering the object of the appeal, however, it will be useful to discuss the judge’s reasons further, specifically those concerning the offence of luring.

* **The judgment under appeal**

1. Because the respondent contested the mandatory minimum sentence of 1 year for this offence, the judge, as was right, first determined what would be the just and appropriate sentence, taking into consideration the purposes and principles of sentencing.[[57]](#footnote-57) Relying on ss. 718 *et seq*. *Cr. C*., she recalled that the total sentence must be proportionate to the gravity of the offences and the respondent’s degree of responsibility, while also noting the importance of denouncing and deterring sexual offences committed against children or adolescents.[[58]](#footnote-58)
2. She then wrote:

[translation]

**Luring**

[62] It is useful here to recall that the offender admitted to committing luring with respect to the adolescent between February 25, 2015, and September 13, 2015. The charge therefore does not cover the period when the acts of a sexual nature began (August 2013) or the period during which the two subsequent sexual episodes occurred (between August 2013 and November 2014).

…

[64] This is not a classic case of a sexual predator who goes on the Internet to find a young victim and facilitate the commission of sexual offences. Given the dates stated in the charge, what the offender is specifically being accused of is having used a means of telecommunication to organize and facilitate sexual encounters with her, which had already been ongoing for a year and a half.

[65] Most of the contact between the offender and the complainant took place on social media networks. Were 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.

[66] This young girl was under the responsibility of the Director of Youth Protection: her outings were controlled and her travel was organized to protect her. Mr. Bertrand Marchand’s conduct with respect to the adolescent contributed to encouraging her to ignore the rules imposed by the workers or the people responsible for her. It put her in danger. The use of social media in secret allowed the encounters to take place, which would have been much more difficult to achieve through in-person or telephone contact.

[67] That being said, the Court also recognizes that today’s young people, both adolescents and young adults, frequently use social media as the usual means of communication. In the Court’s opinion, the means used by the offender to communicate with X reveal a generational choice rather than a means specifically chosen to anonymously browse various websites searching for a young victim or to enter into contact with a young person for the purpose of eventually obtaining sexual favours.

…

[69] A single encounter occurred during the period covered, that of July 19, 2015.

[70] Although these communications were made for the purpose of facilitating the commission of sexual offences against a person under the age of 16 years, the acts committed by the offender do not constitute preparatory grooming of the adolescent for the purpose of lowering her inhibitions and convincing her to participate in sexual activities. She had already consented to such activities three times. They are instead repeated attempts, through the use of electronic conversations, to have sexual intercourse with her again, made in the specific context of a young vulnerable girl who was under the Director of Youth Protection’s care.

…

[72] It is relevant to add that the sentence would have been different had the offender pleaded guilty to having committed luring before the commission of the first incident of sexual interference.

[Emphasis added.]

1. The judge then determined that the terms of imprisonment for sexual touching and luring should be served concurrently, not consecutively. First, she set aside the application of s. 718.3(4)(*b*) *C. Cr*., since the criteria set out in that provision were not met, and of s. 163.1 *Cr. C*. since it concerns solely offences related to child pornography.[[59]](#footnote-59) Second, she distinguished the case from *Rayo*,[[60]](#footnote-60) giving her reasons for doing so in paragraphs 77 and 79.
2. The judge then questioned whether the mandatory minimum sentence of 1 year of imprisonment in cases of luring was grossly disproportionate to the sentence of 5 months she had first found just and appropriate in the circumstances. She answered this question in the affirmative, considering that a well informed public would be outraged to see a sentence as harsh as the minimum sentence of 1 year required in principle by s. 172.1(2)(*a*) *Cr. C.* imposed on the respondent in the particular circumstances of this case. Accordingly, the judge declared that the minimum sentence violated s. 12 the *Charter* and declared it inoperative with respect to the respondent. [[61]](#footnote-61)

* **Analysis**

1. **Standard of review**
2. As this Court has frequently noted, sentencing is profoundly related to context and therefore a difficult task regarding which trial judges have broad discretionary power.[[62]](#footnote-62) Because they have the advantage of seeing and hearing the witnesses and assessing the evidence, they are better placed to impose a just and appropriate sentence in a given case.
3. The standard of review in sentencing therefore requires deference from appellate courts, and it is high. In *Friesen*,[[63]](#footnote-63) the Supreme Court confirmed the standard of review for sentencing set out in *R. v. Lacasse*,[[64]](#footnote-64) and reiterated its teaching on the subject:

[26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence. Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle “[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably”. Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge’s reasons that the error had an impact on the sentence. If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

[Citations omitted.]

1. In reviewing the fitness of a sentence, therefore, the Court must avoid substituting its opinion for that of the trial judge simply because it would have imposed a different sentence or because it would have weighed the relevant factors differently.[[65]](#footnote-65)
2. The standard of review and these principles remain relevant, and the limits they place on review by an appellate court do not change when the sentence is the subject of a constitutional challenge.[[66]](#footnote-66)
3. In addition, the judge’s conclusion that the mandatory minimum sentence of one year for luring violates s. 12 of the *Charter* and must be declared inoperative with respect to the respondent is subject to the standard of correctness.[[67]](#footnote-67)
4. These principles being set out, how do they apply to the issues raised by the appeal?
5. **Is the sentence of 5 months’ imprisonment imposed by the judge for the offence of luring demonstrably unfit in the circumstances?**
6. It is important to specify at the outset that we are obviously not questioning the intrinsic gravity of the offence of luring in a world where technological means allow for easy, indeed deceitful, access to children and adolescents, in a virtual environment where they are often unsupervised and where they may therefore be more vulnerable.[[68]](#footnote-68)
7. In *Legare*,[[69]](#footnote-69) the Supreme Court defined the offence of luring in these terms:

[26] Section 172.1(1) makes it a crime to communicate by computer with underage children or adolescents for the purpose of facilitating the commission of the offences mentioned in its constituent paragraphs. In this context, “facilitating” includes helping to bring about and making easier or more probable — for example, by “luring” or “grooming” young persons to commit or participate in the prohibited conduct; by reducing their inhibitions; or by prurient discourse that exploits a young person’s curiosity, immaturity or precocious sexuality.

1. In *Morrison*,[[70]](#footnote-70) rendered 10 years later, and a year after this Court’s judgment in *Rayo*,[[71]](#footnote-71) the Supreme Court had the opportunity to revisit this offence.In the majority reasons of seven judges, Moldaver, J. referred to this “new and distressing phenomenon of predators lurking in cyberspace, cloaked in anonymity, using online communications as a tool for meeting and grooming children with a view to sexually exploiting them”.[[72]](#footnote-72) In a comment the aptness of which must not be diminished, Moldaver, J. added that “[i]n response, Parliament has enacted provisions in the *Criminal Code*, ... aimed at prohibiting child luring through telecommunications ...”[[73]](#footnote-73)
2. Abella, J., dissenting in part, stated that luring “refers to the deliberate and methodical process in which a predator ...will use private messaging to establish a degree of familiarity with the child before gradually sexualizing the relationship through the use of pornography, sexual conversation online, phone conversations, and, in some cases, the arrangement of a physical encounter”.[[74]](#footnote-74)
3. As Karakatsanis, J. noted in concurring reasons, the offence of luring, as worded in s. 172.1(1) *Cr. C*., covers many situations and can be committed in various ways, under a broad array of circumstances and by individuals with a wide range of moral blameworthiness.[[75]](#footnote-75)
4. In this case, even though the trial judge did not have *Friesen*[[76]](#footnote-76) to guide her when she rendered her judgment, the judge was fully aware of the gravity of the offence of luring and the importance of the objectives of deterrence and denunciation such an offence required in sentencing.She was nevertheless dealing with a specific situation given the particular circumstances of the case before her, which differed from classic cases of luring as described by Moldaver and Abella, JJ. in *Morrison*, as well as with the wording of the period covered by the offence of luring charged against the respondent. That period started on February 25, 2015, well after the first time the respondent and complainant met in person in early August 2013, and well after their conversations on social media had begun and the first three instances of sexual interference had taken place in late summer 2013 and November 2014.
5. It should be recalled that the respondent, who was 22 years old at the time, met the complainant in person in early August 2013 at a rodeo through mutual friends. The evidence also supports that, over the following weeks, he contacted her through Facebook, without hiding or changing his identity, or concealing or otherwise altering his profile picture.[[77]](#footnote-77) The victim, who incidentally told the police that she had two Facebook accounts at the time,[[78]](#footnote-78) accepted his friend request and the parties subsequently talked almost every day through this means of communication.[[79]](#footnote-79) The respondent was aware that the victim was 13 years old at the time.
6. Over the course of the next two years, they continued having conversations on social media, usually on Facebook, but also on Messenger or Snapchat. They had full sexual intercourse twice in late summer 2013. In fall 2014, the complainant, who was 14 years old at the time, was placed in a rehabilitation centre. Despite this fact, they stayed in contact through social media, apparently with the same regularity, and had full sexual intercourse again in November 2014, once again before the period covered in the charge of luring.
7. The respondent had sexual intercourse with the complainant one last time on July 19, 2015. Their conversations on social networks gradually decreased in frequency starting in August 2015 and stopped on September 11, 2015, the day after the victim had given her statement to the police and filed a complaint.
8. The evidence also reveals that the police officers subsequently discovered the Facebook conversations between the parties covering the period from December 7, 2014, two months before the start of the period covered by the offence of luring, until September 13, 2015. A copy of these conversations, filed as exhibit S-4 at trial, is 65 pages long, but the applicants did not see fit to file it again on appeal. It is therefore impossible for this Court to assess its content and tone as a whole, other than by referring to the trial judge’s summary.[[80]](#footnote-80)
9. After setting out the principles applicable to challenging a mandatory minimum sentence, the judge first considered the just and appropriate sentence for the offence of sexual touching and for the offence of luring, but without taking into account the mandatory minimum sentence of 1 year prescribed by Parliament in the latter case. Although she conducted a separate analysis of the appropriate sentence for each offence, her reasons must be examined as a whole.
10. The judge first accepted that the respondent, who is nine years older than the complainant, had full sexual intercourse with her four times over the course of two years and that they maintained their relationship through social media. She noted that this is an ordinary means of communication for this generation. In our opinion, it should be understood that this was an observation and not, as the applicants argue, a comment seeking to trivialize the use of social media and thus mitigate the objective gravity of the offence of luring.
11. The judge also considered the pre-sentence report. She took into account the fact that the respondent benefited from a stable and positive family environment, free of any particular problems, that he had overcome a drug addiction during adolescence, and that despite an unstable career path, he had a job. She noted that he has had romantic relationships since the events, but the uncertainty related to the proceedings and the sentence prevented him from committing to a more long-term relationship. Also, the report does not describe any deviant sexual fantasies, but notes that the respondent assigns importance to the gratification of his sexual needs, which [translation] “led him to obliterate the inherent obstacles, that is, those related to the victim’s age and the illegality of the act”. The person who prepared the report also stated that the respondent had [translation] “cooperated well in the information gathering process”. She concluded that there was a risk of re-offending, but did not quantify it, and stated that this risk could be reduced by psychosocial follow-up focused on the development of certain skills, and a romantic, emotionally stable, committed relationship. The author added that the respondent had no prior convictions and that his admission that he is the only one to blame in this case constitutes an awakening of his awareness.
12. The judgment also reveals that the judge was fully aware that Parliament has intervened three times to increase the minimum and maximum sentences for the indictable offences of sexual touching and luring.[[81]](#footnote-81)
13. The judge noted that the legislative amendments demonstrate the importance of the objectives of denunciation and deterrence that must be reflected in sentences imposed for sexual offences against children.[[82]](#footnote-82) Undeniably, therefore, she had this factor in mind when determining the sentence to impose for luring.
14. That said, she rejected the respondent’s argument that he had succumbed to the complainant’s advances and took care to distinguish the facts of this case from those in *Caron Barrette*.[[83]](#footnote-83) However, the judge accepted – and this also involves her assessment of the evidence, requiring deference – that the respondent was not in a situation of abuse of trust or authority, which was in fact admitted by the Crown during submissions on sentencing.
15. When determining the appropriate sentence for the offence of sexual touching, the judge stated that:

[translation]

[58] The adolescent’s consent in this case cannot be a factor mitigating the offender’s moral blameworthiness with a view to imposing the appropriate sentence.

1. Despite a lack of evidence of the consequences of the crime on the complainant, the judge concluded from certain excerpts of the Facebook conversations of which she had a copy that the complainant appeared to feel used and exploited and that this is why she decided to end the relationship. She also noted that the intervention of the Director of Youth Protection was not related to the facts of this case.
2. At the end of this analysis, the judge concluded that a term of imprisonment of 10 months was appropriate on the count concerning the four incidents of sexual touching.
3. She then determined the appropriate sentence for the indictable offence of luring, which, it should be recalled, covered only the period of a few months preceding the end of the parties’ relationship, during which sexual intercourse took place one final time.
4. The judge made no error in noting that this is not a classic case of a predator assuming a fake identity or using trickery to find or lure victims who are minors over the Internet to facilitate the commission of sexual offences. As she stated, referring to the respondent’s use of social media in this case, they are [translation] “communications leading to the repetition of sexual encounters”,[[84]](#footnote-84) which, it may be said, had started at least 18 months earlier, during a period, moreover, not covered by the charge of luring.
5. Therefore, in exercising her discretion, the judge weighed all the evidence and arrived at a sentence of 5 months’ imprisonment for the offence of luring. To appreciate the overall fitness of this sentence, it is important to note that the judge added a probation order and numerous additional restrictive orders to the prison sentences. She set out these orders as follows in her conclusions:

[translation]

[87] **ORDERS** the offender to comply with a probation order for a period 2 years, with supervision for the same period, the conditions of which are the following:

* + Keep the peace and be of good behaviour;
  + Appear before the Court when required to do so by the Court;
  + Notify the probation officer of any change of name or address, and promptly notify the probation officer of any change of employment or occupation.
  + Abstain from communicating directly or indirectly with X;
  + Abstain from being in the physical presence of X;
  + Abstain from referring, directly or indirectly, to X on any social media whatsoever;
  + Abstain from being within a 30 metre radius of X’s domicile, workplace or place of study;
  + Report to a probation officer within two working days of the coming into force of the probation order, and thereafter, when required and in the manner directed by the probation officer;
  + Follow all of the recommendations of the probation officer, including with respect to the psychosocial follow-up on the development of skills in connection with exercising his judgment and identifying solutions to his problems;

[88] **PROHIBITS** the offender from seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years, pursuant to s. 161(1)(*b*) of the *Criminal Code*, for a period of 5 years;

[89] **PROHIBITS** the offender from having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person responsible for this person under the age of 16 years and who has knowledge of this conviction pursuant to s. 161(1)(*c*) of the *Criminal Code*, for a period of 5 years;

[90] **PROHIBITS** the offender from communicating, directly or indirectly, with X during the custodial period of the sentence pursuant to s. 743.21 of the *Criminal Code*;

[91] **ORDERS** the offender to comply with the *Sex Offender Information Registration Act* for life, pursuant to ss. 490.012(1) and 490.013(2.1) of the *Criminal Code*;

[92]  **ORDERS** the taking of the number of samples of bodily substances from the offender that is reasonably required for the purpose of forensic DNA analysis, pursuant to s. 487.051(1) of the *Criminal Code*,within 60 days.

1. As this Court noted in *Caron Barrette*,[[85]](#footnote-85) the mandatory and additional orders that may be imposed, along with the actual sentence, serve to achieve Parliament’s objective of denunciation and deterrence in s. 718.01 *Cr. C*. This is all the more the case here, where the prohibitions and additional orders the judge imposed on the accused in paragraphs 88, 89, 91 and 92 of her conclusions are specifically related to the powers and duties Parliament imposes on her in the case of a conviction for the offence of luring.[[86]](#footnote-86)
2. Thus, although s. 718.01 *Cr. C.* directs the Court to give primary consideration to the objectives of denunciation and deterrence when it imposes a sentence for an offence involving the abuse of a person under the age of 18 years, the judge is not thereby deprived of his or her discretionary power to individualize the sentence, giving regard to all the circumstances of the offence and the particular characteristics of the accused. The judge’s essential task is to weigh and balance these objectives.[[87]](#footnote-87) The objectives of denunciation and deterrence should be tempered, for example, by the principles and objectives of individualization and proportionality in sentencing.[[88]](#footnote-88)
3. In sum, considering the standard of review applicable in sentencing appeals, we conclude that there is no need to intervene to increase the sentence of 5 months’ imprisonment that the judge imposed on the respondent for the offence of luring. She correctly found that the objective of general deterrence that Parliament associates with the mandatory minimum sentence did not justify imposing a grossly disproportionate sentence given the specific circumstances of the offence and the respondent’s degree of moral blameworthiness.[[89]](#footnote-89) Certainly, the sentence she imposed may appear light, especially in view of the teachings in *Friesen*. However, taking into account the charge as brought, and more specifically the period it covers, the particular circumstances of the case, and the partial evidence available on appeal on the content of the conversations between the parties on social media between December 2014 and September 2015, we cannot find that this sentence is disproportionality light or demonstrably unfit, or that the judge otherwise committed an error in principle justifying this Court’s intervention.
4. Our colleague would have intervened to increase the sentence for luring from 5 to 12 months, essentially for two reasons. First, because the judge committed an error in principle by reducing the objective gravity of the offence because several instances of sexual interference had previously taken place without the victim’s objection. Second, the judge committed another reviewable error in limiting the scope of the luring committed by the accused, when all the essential elements of the offence were present.
5. With respect, we disagree.
6. First, the issue of the complainant’s “consent” refers more to the sexual touching than to luring, the only offence before this Court on appeal. Next, it appears from the judgment that the judge is fully aware of the fact that the complainant’s “*de facto* consent” to sexual intercourse is not a mitigating factor. Thus, when she refers to consent in the section of the judgment on luring, it must be understood that it is used to convey the fact that the circumstances of the luring alleged against the accused cannot be likened to “grooming” within the meaning of the case law. Indeed, the judge wrote:

... the acts committed by the offender do not constitute preparatory grooming of the adolescent for the purpose of lowering her inhibitions and convincing her to participate in sexual activities. She had already consented to such activities three times. They are instead repeated attempts, through the use of electronic conversations, to have sexual intercourse with her again, made in the specific context of a young vulnerable girl who was under the Director of Youth Protection’s care.

[Emphasis added.]

1. Therefore, she does not consider the victim’s lack of opposition to be a mitigating circumstance in the offence of luring, but refers to it as a chronological fact that places the luring in its specific context, thereby making it possible to conduct a proper and individualized assessment of the respondents blameworthiness.
2. With respect to the fact that the judge committed a reviewable error in limiting the scope of the offence of luring, her reasons taken as a whole, and particularly those outlined in paragraphs 64 and 72, reflect on the contrary that she considered that, while all of the essential elements of this offence may be present in a given case, the circumstances of its commission may vary greatly and therefore affect the offender’s degree of moral blameworthiness. Thus, without expressly referring to it in her judgment, the judge did in fact take into account the comments of Moldaver and Karakatsanis, JJ. on this subject in *Morrison*.[[90]](#footnote-90)
3. **The issue of concurrent sentences**
4. There is also no need to intervene with respect to the judge’s order that the sentences for the offence of sexual touching and luring be served concurrently.
5. It is well established that the sentencing judge has broad discretion to impose consecutive or concurrent sentences,[[91]](#footnote-91) except in the specific cases where Parliament has eliminated this discretionary power.[[92]](#footnote-92) The standard of review is therefore high: “the decision to order concurrent or consecutive sentences should be treated with the same deference owed by appellate courts to sentencing judges concerning the length of sentences ordered”.[[93]](#footnote-93)
6. Although Kasirer, J.A., as he then was, stated in *Rayo* that consecutive sentences are generally justified in cases where luring led to sexual offences,[[94]](#footnote-94) the judge here did not commit an error justifying the intervention of this Court in finding that, in the particular circumstance of this case, the luring committed by the respondent was during this period was not preparatory grooming characteristic of this offence, but that it took place through communications that were part of a continuum of approximately 18 months after the start of the parties’ relationship and the first three instances of sexual intercourse.[[95]](#footnote-95)
7. **The minimum 1-year sentence: s. 12 of the *Charter***
8. While the judge’s reasons in support of her conclusion that the mandatory minimum sentence under s. 172.1(2)(*a*) *Cr. C*. must be declared inoperative with respect to the respondent because it infringes s. 12 of the *Charter* are not as developed as some might wish, we are of the opinion that this conclusion is free of errors of law or principle and therefore does not justify any intervention.
9. In *Morrison*,[[96]](#footnote-96) written by Moldaver, J., seven of the nine judges found it “unwise” to rule on the constitutional validity of the mandatory minimum sentence under s. 172.1(2)(*a*) considering, first, the error of law upon which the courts below established Mr. Morrison’s guilt, and second, the Court’s decision to quash the verdict for that reason and order a new trial.[[97]](#footnote-97) Nevertheless, Moldaver, J. deemed it appropriate to note that “several features of s. 172.1 suggest that the mandatory minimum under subs. (2)(*a*) is, at the very least, constitutionally suspect.”[[98]](#footnote-98) In fact, supported by case law, he added, “[s]ubsection 172.1(2) “casts its net over a wide range of potential conduct”, making it potentially vulnerable to constitutional challenge given the range of reasonably foreseeable applications of the mandatory minimum”.[[99]](#footnote-99)
10. In her concurring reasons, Karakatsanis, J. for her part concluded that it is preferable to decide the constitutional question to avoid, among other things, other individuals being convicted of a child luring offence by way of indictment and finding themselves subject “to a mandatory minimum sentence that is constitutionally unsound”.[[100]](#footnote-100)
11. Thus, she first noted that the offence of luring targets a multitude of situations and that the mandatory minimum sentence it carries is accordingly more vulnerable to constitutional challenge.[[101]](#footnote-101)
12. Incidentally, the majority in the judgment rendered by this Court in *R. c. Lefrançois*[[102]](#footnote-102) made an observation on the same theme concerning mandatory minimum sentences in general:

[translation]

[109] Minimum sentences are criticized and questionable. They are constitutionally vulnerable in many respects.

[110] Indeed, in cases that fall under the minimum threshold, the minimum sentence requires the judge to set aside the fundamental principle of proportionality in sentencing. The minimum sentence prioritizes the objective of deterrence to the detriment of the other sentencing objectives.

[111] Minimum sentences “modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result.” Through this measure, Parliament seeks to “remove judicial discretion to impose a sentence below the stipulated minimum.”

[Citations omitted.]

1. Karakatsanis, J. next concluded that the mandatory minimum sentence in s. 172.1(2)(*a*) violates s. 12 of the *Charter* and is not saved by s. 1.[[103]](#footnote-103)
2. That said, in *Lloyd*,[[104]](#footnote-104) the Supreme Court stated that a “grossly disproportionate” sentence is one that is “so excessive as to outrage standards of decency” and “abhorrent or intolerable” to society.[[105]](#footnote-105) The Court noted moreover that the wider the range of conduct and circumstances captured by the mandatory minimum, the more likely it is that the mandatory minimum will apply to offenders for whom the sentence would be grossly disproportionate.[[106]](#footnote-106)
3. As we have seen, the judge did in fact conclude that imposing the mandatory minimum sentence of 1 year on the respondent for the offence of luring as laid out in the count, considering the circumstances of its commission, would be [translation] “totally disproportionate with respect to him” and that it was therefore appropriate to declare it inoperative to that extent.[[107]](#footnote-107) For the judge, a well-informed public would be outraged by the imposition of this sentence on the respondent considering the circumstances as a whole.[[108]](#footnote-108) It is clear that, for her, this same public would on the contrary understand that the respondent should not receive a sentence as harsh as the minimum sentence of one year that s. 172.1(2)(*a*) *Cr. C.* requires in principle.
4. Given this conclusion, which we consider correct and seals the fate of the mandatory minimum sentence with respect to s. 12 of the *Charter*, the judge did not have to go further in her analysis or examine the reasonably foreseeable applications of the mandatory minimum sentence.[[109]](#footnote-109) As Karakatsanis, J. also in fact notes in *Morrison*, if the judge concludes that the mandatory minimum is a grossly disproportionate sentence when applied to the circumstances of the specific offender before the court, then the mandatory minimum sentence violates s. 12, without needing to go further in the analysis to verify whether the minimum sentence would be grossly disproportionate in other reasonably foreseeable cases.[[110]](#footnote-110)
5. **Justification: s. 1 of the *Charter***
6. The judge did not rule on this issue. Because the parties addressed it in their written arguments and during submissions at the hearing, although without placing great emphasis on the issue, it should be analyzed.
7. In *Nur*,[[111]](#footnote-111) McLachlin, C.J. noted that for most it will be difficult for the Crown to show that a mandatory minimum sentence that has been found to be grossly disproportionate under s. 12 is nonetheless proportionate as between the deleterious and salutary effects of the law for the purpose of the justification test under s. 1.[[112]](#footnote-112)
8. This likely explains why the applicants devoted so little effort to addressing this issue.
9. Thus, in their joint written arguments, the Attorney General of Quebec merely proposed laconically that, in the event that the Court concludes that there is a violation of s. 12, the mandatory minimum sentence of 1 year of imprisonment set out in s. 172.1(2)(*a*) *Cr. C*. would be justified under s. 1 [translation] “on the same grounds as those proposed to support a finding of no violation of s. 12”.[[113]](#footnote-113) At the hearing, the Attorney General of Quebec did not elaborate further.
10. The applicants have therefore failed to establish that there are no less harmful measures available to appropriately sanction the offence of luring than a mandatory minimum sentence of 1 year of imprisonment in the case of all offenders, regardless of the individual circumstances specific to each and the different facts that may characterize each situation. Nothing convincing appears in the record to assess whether such a minimum sentence is the least impairing means of achieving the commendable legislative objective of deterring and denouncing sexual offences committed against minors.
11. The applicants have also failed to show that the prejudicial effects of the significant restriction on the freedom of offenders through the imposition of a minimum sentence of 1 year of imprisonment in all cases are proportionate to the salutary effects. We cannot rule out the possibility, for example, that Parliament maintained the judicial discretion to adjust the prison sentence to take certain particular cases into account would serve to achieve its objectives, in a way that is more appropriate and more consistent with constitutional guarantees.
12. In sum, the Court was not presented with sufficient evidence at trial or convincing arguments on appeal supporting the justification for the impairing provision.
13. For these reasons, we would grant the application for leave to appeal, dismiss the appeal, and declare that the minimum sentence under s. 172.1(2)(*a*) violates the *Canadian Charter of Rights and Freedoms* in the case of the respondent and that it is inoperative with respect to him.

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| GENEVIÈVE COTNAM, J.A. |

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| MICHEL BEAUPRÉ, J.A. |

1. *R. c. Bertrand Marchand*, 2020 QCCQ 1135 [judgment under appeal]. This sentence is supplemented by the following orders: 2 years’ probation with supervision for the same period (including an order to refrain from communicating with the victim or being in her presence), an order prohibiting him from communicating with her during the custodial period of the sentence (s. 743.21 *Cr. C*.), an order to provide DNA samples (s. 487.051(1) *Cr. C*.), an order to comply with the *Sex Offender Information Registration Act* for life (s. 490.012(1) and 490.013(2.1) *Cr. C.*), and orders under ss. 161(1)(*b*) and (*c*) for a period of 5 years. [↑](#footnote-ref-1)
2. Judgment under appeal. [↑](#footnote-ref-2)
3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [↑](#footnote-ref-3)
4. Since the mandatory minimum sentence under paragraph 151(*a*) Cr. C. was declared constitutionally invalid on April 3, 2018, by this Court, the respondent had only to raise the constitutional invalidity of the mandatory minimum sentence under paragraph 172.1(2)(*a*) *Cr. C*.(*Caron Barrette c. R.*, 2018 QCCA 516). [↑](#footnote-ref-4)
5. Application for leave to appeal the sentence and the declaration of inoperability, April 14, 2020. [↑](#footnote-ref-5)
6. *R. c. Bertrand Marchand*, 2020 QCCA 630 (Ruel, J.A.). [↑](#footnote-ref-6)
7. Judgment under appeal at paras. 15–20, 38, 43–44, 49, 53, 59–61, 63–64, 67–68, 70–71, 78–79. [↑](#footnote-ref-7)
8. Judgment under appeal at paras. 1–6. [↑](#footnote-ref-8)
9. Judgment under appeal at paras. 33, 37 and 40. [↑](#footnote-ref-9)
10. During his testimony on November 4, 2019, the respondent acknowledged that it was [translation] “more of a sexual relationship... there was nothing romantic there” (Examination in chief, November 4, 2019, at 45, lines 15 and 16) and that [translation] “there were about six (6) - seven (7) – maybe eight (8)” sexual relations (Examination in chief, November 4, 2019, at 47, lines 22–23). [↑](#footnote-ref-10)
11. Judgment under appeal at paras. 38, 43, 45, 49, 53–54 and 60–61. [↑](#footnote-ref-11)
12. Judgment under appeal at paras. 62–72 [emphasis added]. [↑](#footnote-ref-12)
13. *R. c. Rayo*, 2018 QCCA 824. [↑](#footnote-ref-13)
14. Judgment under appeal at paras. 73–79. [↑](#footnote-ref-14)
15. Judgment under appeal at paras. 81–86. [↑](#footnote-ref-15)
16. Judgment under appeal at para. 82. [↑](#footnote-ref-16)
17. *R. v. Lacasse*, 2015 SCC 64 at paras. 41, 44 and 49. [↑](#footnote-ref-17)
18. *R. v. Friesen*, 2020 SCC 9 at paras. 25 and 26. [↑](#footnote-ref-18)
19. *R. c. Trottier*, 2020 QCCA 703 at para. 32, citing *R. c. Lefrançois*, 2018 QCCA 1793 at para. 7. [↑](#footnote-ref-19)
20. *Caron Barrette c. R.*, 2018 QCCA 516 at para. 39. [↑](#footnote-ref-20)
21. *R. v. Friesen*, *supra* note 18. [↑](#footnote-ref-21)
22. *Ibid.* at para*.* 107. [↑](#footnote-ref-22)
23. *Ibid.* at para. 100. [↑](#footnote-ref-23)
24. *Ibid.* at para. 93. [↑](#footnote-ref-24)
25. Judgment under appeal at para. 38. [↑](#footnote-ref-25)
26. *Ibid.* at paras*.* 49–50, 52, 54. [↑](#footnote-ref-26)
27. *Ibid.* at para*.* 59. [↑](#footnote-ref-27)
28. *Ibid.* at paras. 64-65. [↑](#footnote-ref-28)
29. *Ibid*. at para. 67. [↑](#footnote-ref-29)
30. *Ibid*.at para. 70. [↑](#footnote-ref-30)
31. Submissions of December 17, 2019, at 43. [↑](#footnote-ref-31)
32. Submissions of December 17, 2019, at 98, lines 19 to 22. [↑](#footnote-ref-32)
33. *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551 at paras. 3, 28, 36 and 39–40. See also: *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3 at para. 95; *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3 at para. 23. [↑](#footnote-ref-33)
34. *R. v. Friesen*, *supra* note 18 at para. 153. [↑](#footnote-ref-34)
35. *R. c. Rayo*, *supra*, note 13 at para. 126. See also: *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 177, where Karakatsanis, J. recognized that “in many cases, the appropriate sentence will be a term of imprisonment that falls within the range contemplated by s. 172.1(2)(*a*)”. [↑](#footnote-ref-35)
36. Submissions of December 17, 2019, at p. 36, line 23 to p. 38, line 6. [↑](#footnote-ref-36)
37. These factors are the following: the lack of prior convictions, his age at the time of the events, holding a job for two years, his honesty and cooperation with the pre-sentence report, and his stable family life. [↑](#footnote-ref-37)
38. *R. v. Friesen*, *supra* note 18 at paras. 86, 88, 90 and 90. [↑](#footnote-ref-38)
39. *R. c. Rayo*, *supra* note 13 at para 50, citing *R. v. Delchev*, 2014 ONCA 448 at para. 34. [↑](#footnote-ref-39)
40. *Ibid*. at paras. 137–139 and 141. [↑](#footnote-ref-40)
41. Judgment under appeal at paras. 78–79. [↑](#footnote-ref-41)
42. By analogy, see *Tremblay c. R*., 2014 QCCA 690 at para. 349. [↑](#footnote-ref-42)
43. Judgment under appeal at para. 60. [↑](#footnote-ref-43)
44. *R. c. Rayo*, *supra* note 13 at para 52; *Daquin c. R*., 2017 QCCA 1538, para. 20; *R. c. Guerrero Silva*, 2015 QCCA 1334, para. 55; *Desjardins c. R.*, 2015 QCCA 1774 at paras. 30 and 34; *J.V. c. R.*, 2014 QCCA 1828 at paras. 28–29. This also appears consistent with the judgment of this Court in *Vera Camacho c. R*., 2021 QCCA 683. [↑](#footnote-ref-44)
45. *R. v. Veysey*, 2006 NBCA 55. [↑](#footnote-ref-45)
46. *R. c. Bergeron*, 2016 QCCA 339; *R. c. Colangelo*, 2017 QCCA 195; *R. c. Foster*, 2020 QCCA 1172; *K. F. c. R*., 2021 QCCA 67; *R. c. Davidson*, 2021 QCCA 545. [↑](#footnote-ref-46)
47. *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599 at para. 45; these principles were reiterated by the Supreme Court in *Quebec (Attorney General) v. 9147-0732 Québec inc*., 2020 SCC 32. [↑](#footnote-ref-47)
48. *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773 at para. 77. [↑](#footnote-ref-48)
49. *Caron Barrette c. R*., *supra* note 20 at paras. 73–75. [↑](#footnote-ref-49)
50. *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130 at para. 18. [↑](#footnote-ref-50)
51. *R. v. Morrison*, *supra* note 35. [↑](#footnote-ref-51)
52. *R. v. Hood*, 2018 NSCA 18. [↑](#footnote-ref-52)
53. *Ibrahim c. R.*, 2018 QCCA 1205. See also *Y.P. c. R.*, 2019 QCCA 1506. [↑](#footnote-ref-53)
54. Section 151(*a*) *Cr. C..*  [↑](#footnote-ref-54)
55. Section 172.1(1)(*b)* *Cr. C.* [↑](#footnote-ref-55)
56. *R. c. Bertrand-Marchand*, 2020 QCCQ 1135 [judgment under appeal]. [↑](#footnote-ref-56)
57. *R. v. Lloyd*, 2016 SCC 13 at para. 23; *R. v. Nur*, 2015 SCC 15 at para. 46. [↑](#footnote-ref-57)
58. Judgment under appeal at paras. 33, 37 and 40. [↑](#footnote-ref-58)
59. *Ibid*. at paras. 73–75. [↑](#footnote-ref-59)
60. *R. c. Rayo*, 2018 QCCA 824. [↑](#footnote-ref-60)
61. Judgment under appeal at paras. 81–83. [↑](#footnote-ref-61)
62. See especially *Cabezas c. R*., 2018 QCCA 1616 at para. 114 and *J.B. c. R.,* 2014 QCCA 92 at para. 15. [↑](#footnote-ref-62)
63. *R. v. Friesen*, 2020 SCC 9. [↑](#footnote-ref-63)
64. *R. v. Lacasse*, 2015 SCC 64. [↑](#footnote-ref-64)
65. *Caron Barrette c. R*., 2018 QCCA 516 at para. 39. [↑](#footnote-ref-65)
66. *R. c. Trottier*, 2020 QCCA 703 at para. 32, citing the reasons of the majority in *R. c. Lefrançois*, 2018 QCCA 1793 at para. 7. [↑](#footnote-ref-66)
67. *R. v. Shepherd*, 2009 SCC 35 at para. 20; *Boudreault c. R.,* 2016 QCCA 1907 at para. 32 (reversed for other reasons, 2018 SCC 58); *R. v. Madeley*, 2018 ONSC 391 at para. 15; *Foisy c. R*., 2017 QCCA 1721 at para. 23. [↑](#footnote-ref-67)
68. *R.* *c. Rayo*, *supra* note 60 at para. 139. [↑](#footnote-ref-68)
69. *R. v. Legare*, 2009 SCC 56. [↑](#footnote-ref-69)
70. *R. v. Morrison*, 2019 SCC 15. [↑](#footnote-ref-70)
71. *R. c. Rayo*, *supra* note 60. [↑](#footnote-ref-71)
72. *Ibid*. at para. 2 (emphasis added). [↑](#footnote-ref-72)
73. *Ibid*. at para. 3 (emphasis added). [↑](#footnote-ref-73)
74. *Ibid*. at para. 197 (emphasis added). [↑](#footnote-ref-74)
75. *Ibid*. at para. 179. [↑](#footnote-ref-75)
76. *R. v. Friesen*, *supra* note 63. [↑](#footnote-ref-76)
77. Statement by X to the police officers on September 10, 2015. [↑](#footnote-ref-77)
78. *Ibid*. [↑](#footnote-ref-78)
79. *Ibid*. at 24. [↑](#footnote-ref-79)
80. Judgment under appeal paras. 46–51. [↑](#footnote-ref-80)
81. Judgment under appeal at para. 35 and corresponding footnote. [↑](#footnote-ref-81)
82. Judgment under appeal at paras. 39–41. [↑](#footnote-ref-82)
83. *Caron Barrette c. R.,* *supra* note 65. [↑](#footnote-ref-83)
84. Judgment under appeal at para. 78. [↑](#footnote-ref-84)
85. *Caron Barrette c. R*., *supra* note 65 at para. 85. [↑](#footnote-ref-85)
86. The prohibitions contained the conclusions of paragraphs 88 and 89, pursuant to ss. 161(1)(*b*) and (*c*) *Cr. C.,* arise at least in part from the fact that the offence of luring is one of the offences referred to in s. 161(1.1); the order to comply with the *Sex Offender Information Registration Act* arises from the fact that luring is referred to in s. 490.011(1)(a*)*(x) *Cr. C.*,and that order is for life due to the judge’s obligation to render it given the appellant’s convictions for sexual touching and luring (s. 490.013(2.1)and490.011(1)(*a*)(ii) and (x) *Cr. C*.); last, the order for the taking of samples of bodily substances from the accused for the purpose of forensic DNA analysis stems at least in part from the judge’s power to render it because luring is one of the primary offences defined in s. 487.04(*a*)(i.91) *Cr. C.* [↑](#footnote-ref-86)
87. *Harbour c. R*., 2017 QCCA 404 at para. 81 *et seq*.; *R. c. Rayo*, *supra* note 60 at paras. 108–109. [↑](#footnote-ref-87)
88. *Lacelle Belec c. R*., 2019 QCCA 711 at paras. 30, 33-35, and 89-90. [↑](#footnote-ref-88)
89. *Caron Barrette c. R.*, *supra* note 65 at para. 84, citing *R. v. Nur*, *supra* note 57 at para. 45 *in fine*. [↑](#footnote-ref-89)
90. *R. v. Morrison*, *supra* note 70 at paras. 146, 179 and 187. [↑](#footnote-ref-90)
91. *R. c. Rayo*, *supra* note 60 at para. 50, citing *R. v. Delchev,* 2014 ONCA 448 at para. 34. [↑](#footnote-ref-91)
92. E.g., offences committed against one or more children under s. 718.3(7) *Cr. C*. [↑](#footnote-ref-92)
93. *R. c. McDonnell*, [1997] 1 S.C.R. 948 at para. 46; *R. c. Bisson*, 2019 QCCA 2012 at para. 8; *R. c. Desjardins*, 2017 QCCA 196 at para. 16; *R. c. Aoun*, 2008 QCCA 440 at para. 36. [↑](#footnote-ref-93)
94. *Ibid.* at paras. 137–139 and 141. [↑](#footnote-ref-94)
95. Judgment under appeal at paras. 78–79. [↑](#footnote-ref-95)
96. *R. v. Morrison*, *supra* note 70. [↑](#footnote-ref-96)
97. *Ibid*. at para. 145. [↑](#footnote-ref-97)
98. *Ibid.* at para. 146. [↑](#footnote-ref-98)
99. *Ibid*. [↑](#footnote-ref-99)
100. *Ibid*. at para. 162. [↑](#footnote-ref-100)
101. *Ibid*. at para. 179. [↑](#footnote-ref-101)
102. *R. c. Lefrançois*, 2018 QCCA 1793 (leave to appeal to the S.C.C. refused 38470 (13 June 2019). [↑](#footnote-ref-102)
103. *R. v. Morrison*, *supra* note 70 at para. 163. [↑](#footnote-ref-103)
104. *R. v. Lloyd*, *supra* note 57. [↑](#footnote-ref-104)
105. *Ibid*. at para. 34. [↑](#footnote-ref-105)
106. *Ibid*. [↑](#footnote-ref-106)
107. Judgment under appeal at paras. 82. [↑](#footnote-ref-107)
108. *Ibid.* [↑](#footnote-ref-108)
109. *R. v. Goltz*, [1991] 3 S.C.R. 485 at 505; *R. v. Nur*, *supra* note 57 at para. 46; *R. v. Morrison*, *supra* note 70, para. 144; *Caron Barrette*, *supra* note 65 at para. 72. [↑](#footnote-ref-109)
110. *R. v. Morrison*, *supra* note 70 at paras. 167–168. [↑](#footnote-ref-110)
111. *R. v. Nur*, *supra* note 57. [↑](#footnote-ref-111)
112. *Ibid*. at para. 111. [↑](#footnote-ref-112)
113. Applicants’ written arguments at para. 92. [↑](#footnote-ref-113)