Unofficial English Translation of the Judgment of the Court

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| R. c. H.V. | | | | | 2022 QCCA 16 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-10-007541-210 | | | | |
| (540-36-001085-199) (540-01-080712-170) | | | | | |
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| DATE: | January 12, 2022 | | | | |
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| CORAM: | | THE HONOURABLE | | MARK SCHRAGER, J.A.  BENOÎT MOORE, J.A.  PETER KALICHMAN, J.A. | |
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| HER MAJESTY THE QUEEN | | | | | |
| ATTORNEY GENERAL OF QUEBEC | | | | | |
| APPELLANTS – appellants | | | | | |
| v. | | | | | |
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| H. V. | | | | | |
| RESPONDENT – respondent | | | | | |
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| JUDGMENT | | | | | |
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| (Publication ban under section 486.4 *Cr. C*. prohibiting the broadcast of any information that could identify the victim). |

1. We are seized of an appeal from a judgment rendered on February 25, 2021, by the Superior Court, Criminal Division, District of Laval (the Honourable Myriam Lachance), sitting in appeal of a sentencing judgment of the Court of Québec, Criminal and Penal Division, dated November 21, 2019,[[1]](#footnote-1) rendered following a summary prosecution. The Superior Court judgment declared that the mandatory minimum sentence of 6 months’ imprisonment under section 172.1(2)(b) *Cr. C.* for luring a child was constitutionally invalid and sentenced the respondent to a term of imprisonment of 90 days to be served intermittently.
2. Before this Court, the appellants raise two questions, namely:
3. Did the Superior Court render a demonstrably unfit sentence that does not reflect the objective and subjective gravity of the offence committed by the respondent?
4. Did the Superior Court err in law in concluding that section 172.1(2)(b) *Cr.  C*. is constitutionally invalid under section 12 of the *Charter*?
5. A judge of the Court granted leave to appeal under section 839 *Cr. C*. on the second question since it is a question of law but deferred the application for leave to appeal on the first question to this panel.

# FACTS

1. On September 17, 2018, the respondent pleaded guilty before the Court of Québec to the offence charged and acknowledged the following facts:[[2]](#footnote-2)

[translation]

The accused is the uncle and godfather of the victim, X (2001-[...]). At the time the offences were committed, the accused was 52 years old and the victim was 16 years old. On July 31, 2017, during a family dinner at the accused’s home, the accused took advantage of a moment alone with the victim to tell her that her buttocks and breasts were beautiful. She was wearing a bathing suit at the time. That night, the accused started sending sexual text messages to the victim, the whole as it appears from the text messages filed *en liasse* under S-1.

He continued to send sexual text messages until August 9, 2017. In these messages, the accused also asked the victim to delete the conversations and not to tell anyone about them. The next week, the accused suggested to the victim’s mother that she come work for him as an office employee at the school where he is principal. The victim agreed.

On August 8, 2017, the victim went to the school for the first time to meet the staff and visit the premises. While they were visiting the library, the accused hugged the victim. At the end of the day, the accused drove the victim to her mother’s place of work. On the way there, they spoke again about the text messages. The accused insisted that the victim delete the conversation. He also suggested that the victim make arrangements so that they could see each other. Finally, he placed his hand on the victim’s thigh. She did not know how to react and froze.

The next day, August 9, 2017, the victim returned to work. Around 4:00 p.m., after the staff had left and the victim was alone in the secretary’s office, the accused positioned himself behind her. He put his arms around the victim’s shoulders and took the opportunity to touch the victim’s breasts using his two hands, over her clothing. The victim turned around and called the accused by his name, to which the accused asked her if she liked it. The victim said [translation] “no” and left work, refusing the accused’s offer to drive her.

The same day, at 5:42 p.m., the accused communicated with the victim by text message to apologize, then a brief conversation followed in which the accused asked the victim if he [translation] “could start over”. When the victim refused, the accused continued by stating: [translation] “If I understand, I can look, but I can’t touch?”, the whole as it appears from the text messages filed *en liasse* under S-1.

The victim subsequently quit her job and, in the days that followed, filed a complaint with the Ville de Laval police department.

1. Before the Court of Québec and the Superior Court, the respondent raised the constitutional validity of the mandatory minimum sentence of 6 months’ imprisonment set out in section 172.1(2)(b) *Cr. C*. in light of section 12 of the *Canadian Charter of Rights and Freedoms*[[3]](#footnote-3) (hereinafter “*Charter*”) dealing with cruel and unusual punishment.
2. In a written judgment[[4]](#footnote-4) dated November 21, 2019, Gilles Garneau J. (Court of Québec) declared the mandatory minimum sentence inoperative with respect to the respondent and suspended sentencing, while ordering 2 years’ probation along with 150 hours of community work to be performed within 12 months.[[5]](#footnote-5)
3. In her detailed 39-page judgment (299 paragraphs) dated February 25, 2021, the Superior Court judge, sitting in appeal of the sentencing judgment of November 21, 2019, upheld the declaration of inoperability of the minimum sentence with respect to the respondent and declared it invalid under paragraph 52(1) of the *Charter*. She also substituted the sentence rendered at trial with a sentence of 90 days’ imprisonment to be served intermittently and 3 years’ probation to end on November 21, 2022, including 150 hours of community work (already completed).
4. The appellants raise the two grounds of appeal stated above. First, they argue that the sentence is demonstrably unfit. Leave to appeal on this ground was deferred to the bench. Considered in isolation, it is a question of fact or of mixed law and fact that cannot be appealed when the Court is sitting in appeal under section 839 *Cr. C*.[[6]](#footnote-6) Next, they argue that the mandatory minimum sentence for the offence concerned is constitutional, which is a question of law.
5. In the circumstances of the case and given the analysis required, there is in fact only one issue to resolve, that of the constitutional validity of the mandatory minimum sentence. The answer to the first question is a necessary step to answering the second question. To dispel any ambiguity, leave to appeal on the first question will be granted, even though it is not strictly necessary in this case since it is included in the second question, which is a question of law. However, we note that the standard of review with respect to the fitness of a sentence when it is part of a constitutional challenge remains unchanged, namely, that of deference, unless the sentence is demonstrably unfit or contains an error in principle.[[7]](#footnote-7)

# JUDGMENT UNDER APPEAL

1. It should be noted that the two abovementioned grounds of appeal were among those submitted as is to the Superior Court judge,[[8]](#footnote-8) who began her rigorous analysis of the issues in dispute by recalling her power of appellate intervention.[[9]](#footnote-9) She next provided the legal definition of luring,[[10]](#footnote-10) an inchoate offence, that does not require sexually explicit language even though such language may suffice to prove the respondent’s criminal intent.[[11]](#footnote-11) She summarized the analysis of the trial judge[[12]](#footnote-12) and set out the analytical approach she would follow on appeal.[[13]](#footnote-13)
2. The judge first dealt with the parity in sentencing principle codified in section 718.2(b) *Cr. C*. and the sentencing ranges to determine whether the trial judge had committed an error.[[14]](#footnote-14) She noted that an appellate court may not intervene simply because it would have placed the sentence in a different range or category.[[15]](#footnote-15) She reviewed the sentencing ranges for luring and considered the prosecution’s mode of prosecution.[[16]](#footnote-16) The judge noted, however, that the sentencing ranges applicable to the offence of luring had changed to respond to Parliament’s initiatives[[17]](#footnote-17) and recalled the vast differences in possible sentences between proceedings by way of indictment and by way of summary conviction.[[18]](#footnote-18) The judge added that, since the Court of Québec judgment, the Supreme Court had rendered *Friesen*[[19]](#footnote-19) and the Court of Appeal had rendered *Montour*,[[20]](#footnote-20) both of which set out certain guidelines regarding sentences imposed for such offences.[[21]](#footnote-21)
3. The judge devoted the next pages of her judgment to an exhaustive review of the case law on luring pre- and post-*Friesen* and, at the end of her analysis, observed that these judgments revealed a strong trend towards longer sentences for luring.[[22]](#footnote-22)
4. After analyzing the various mitigating and aggravating factors accepted by the judge of the Court of Québec, the judge noted two errors he committed. He did not respect the parity in sentencing principle, and he erred in his characterization of the mitigating and aggravating factors.[[23]](#footnote-23) Specifically, the Court of Québec judge’s analysis should have taken into consideration the respondent’s commission of the offence, which constituted an actual assault.[[24]](#footnote-24) Furthermore, he considered the short duration of the offence to be a mitigating factor, which is also a reviewable error.[[25]](#footnote-25)
5. The Superior Court judge also agreed with the appellants that the reasons in the Court of Québec judgment were inadequate. In this regard, she stated that the judgment did not explain why the objective of rehabilitation took such precedence over the legally prescribed objectives of denunciation and deterrence.[[26]](#footnote-26) On that basis, she concluded that this error diminished the deference owed to that judgment.[[27]](#footnote-27)
6. Recalling again the standard of review based on the requirement of restraint,[[28]](#footnote-28) the Superior Court judge once again noted the Court of Québec judge’s errors and concluded that the sentence was unreasonably lenient and demonstrably unfit, and that she was therefore authorized to reassess what the appropriate sentence in this case would be.[[29]](#footnote-29)
7. During her analysis of the fit sentence, the judge noted that the respondent’s insistence on wanting to be alone with the victim was a breach of trust that increased the gravity of the offence.[[30]](#footnote-30) This circumstance, coupled with the commission of the offence, meant that the respondent was not on the low end of the gravity scale of this offence.[[31]](#footnote-31)
8. However, the sexologist concluded in her report, filed in the record, that these were acts of opportunity and that the respondent did not have a sexual deviancy toward children.[[32]](#footnote-32) The Superior Court judge also took into account the respondent’s guilty plea enabling the victim to avoid appearing before the court,[[33]](#footnote-33) and noted the respondent’s suicide attempt and psychological therapy.[[34]](#footnote-34) He acknowledges the negative impact of his conduct on the victim and on their family circle. The sexologist noted that the respondent is capable of introspection.[[35]](#footnote-35)
9. At the end of her analysis, the judge considered that a sentence of approximately 4 months is a quantum [translation] “that takes into consideration the objectives of denunciation and deterrence, the aggravating factors, including the commission of the offence, the breach of trust and abuse of authority, but also the choice of mode of prosecution by way of summary conviction proceedings on one count only”.[[36]](#footnote-36) She added that the sentence also reflects the respondent’s low risk of reoffending, his compliance with his release conditions since August 22, 2017, and his participation in therapy to achieve rehabilitation.[[37]](#footnote-37)
10. The judge then moved on to the analysis in *Nur*. Since she was imposing a harsher sentence than the trial judge, who had ended his analysis at the first step, she had to ask whether the sentence of 4 months was grossly disproportionate compared to the minimum sentence and whether a sentence of 6 months constituted cruel and unusual punishment.[[38]](#footnote-38) The judge concluded that the sentence of 4 months was not grossly disproportionate in relation to the sentence of 6 months[[39]](#footnote-39) and proceeded to the second step of the analysis, that of reasonable hypothetical cases.[[40]](#footnote-40)
11. At this step, the Superior Court judge analyzed three cases, all taken directly from the case law and submitted by the respondent, namely, *Hood*,[[41]](#footnote-41) *John*[[42]](#footnote-42)and *Randall*.[[43]](#footnote-43) She rejected the second because in that case, which dealt with child pornography, no fact in the example analyzed by the Court of Appeal for Ontario could be equated to luring.[[44]](#footnote-44) However, she accepted the hypothetical accepted in *Hood* (in which the sentence of 1 year for luring punishable by way of indictment was invalidated by the Nova Scotia Court of Appeal) and the case in *Randall* as two cases illustrating situations where 6 months’ imprisonment represents a grossly disproportionate sentence.[[45]](#footnote-45) The judge thus concluded that the mandatory minimum sentence under section 172.1(2)(b) *Cr. C*. violated section 12 of the *Charter*.
12. The analysis to determine whether the minimum sentence is justifiable under section 1 of the *Charter* was brief. Essentially, she reiterated the teachings of the Supreme Court in *Nur*, stating that it is difficult to imagine that a minimum sentence considered inconsistent with the principle of human dignity could be justified under section 1 of the *Charter*.[[46]](#footnote-46)Since the violation was not justified, she struck down the prescribed minimum sentence.[[47]](#footnote-47)
13. The Superior Court judge next assessed whether the respondent should be incarcerated since he had already served most of his sentence. Because the Court of Québec judge had ordered only the performance of community work, the judge considered that the question concerned his [translation] “incarceration” rather than his [translation] “reincarceration”.[[48]](#footnote-48) Nevertheless, she took into account the sentence served in the quantum of the sentence she imposed on the respondent.[[49]](#footnote-49) Considering the rehabilitation process the respondent had chosen and the fact that he succeeded in again becoming an asset to society, the judge imposed a sentence of 90 days to be served intermittently.[[50]](#footnote-50)

# POSITION OF THE APPELLANTS

1. Based on the same arguments previously pleaded in Superior Court, the appellants submit that the sentence imposed by the Superior Court judge is demonstrably unfit as it represents too great a departure from the applicable range. Concerning the sentence imposed, the appellants allege that the Superior Court judge failed to provide sufficient reasons for her decision (s. 726.2 *Cr. C.*) to impose a sentence of 4 months and that she did not respect the principle of parity in sentencing (s. 718.2(b) *Cr. C*.).
2. The appellants also fault the Superior Court’s analysis of the reasonable hypothetical cases. They claim that the analysis of three cases is insufficient to conclude that the impugned provision is unconstitutional. They also argue that the Superior Court erred in its analysis of *Hood* and that it cannot apply to the mandatory minimum sentence when the offence is prosecuted by way of summary conviction.

# DISCUSSION

## Did the Superior Court render a demonstrably unfit sentence that does not reflect the objective and subjective gravity of the offence committed by the respondent?

1. As stated above, although the harshness of a sentence viewed in isolation does not raise a question of law,[[51]](#footnote-51) in this case, this question is an integral and essential element of the constitutional analysis recommended by the Supreme Court in *Lloyd*[[52]](#footnote-52)and *Nur*.[[53]](#footnote-53)
2. However, the analysis of this element or sub-question requires the application of the standard of palpable and overriding error, which requires deference, unless the sentence is demonstrably unfit or calculated on the basis of an error in principle.[[54]](#footnote-54)
3. The Superior Court judge took into consideration the relevant case law, in particular *Friesen*, where the Supreme Court emphasized the gravity of sexual offences committed against children and remarked that the courts must acknowledge this gravity in sentencing.[[55]](#footnote-55)
4. The judge applied the principles established in the case law to the specific circumstances of the respondent’s case, including the fact that, according to the sexologist’s report, there was [translation] “full” recognition of guilt.[[56]](#footnote-56) The judge also explained why she considered the respondent’s rehabilitation an element to be weighed, given his suicide attempt, his participation in psychological therapy, and his acknowledgment of the negative impacts of the events.[[57]](#footnote-57) She took into account, however, the breach of the victim’s trust, the fact that the respondent denied having had sexual intentions in sending the text messages, and the commission of the offence.[[58]](#footnote-58)
5. Following a rigorous analysis of the circumstances of this case, the judge decided on a sentence of 4 months:

[translation]

[182]     However, considering the range of applicable sentences for luring, the objective and subjective gravity of the offence with which the respondent is charged, and the legislative principles, including the objectives of deterrence and denunciation that must be given primary consideration, the fit sentence that should be imposed is a term of imprisonment.

[183]     A sentence of incarceration of about 4 months is a quantum that takes into account the objectives of denunciation and deterrence, the aggravating factors including the commission of the offence, breach of trust, and abuse of authority, but also the choice to prosecute by way of summary conviction proceedings on one count only.

1. The appellants argue that the sentence is demonstrably unfit since it departs too much from the sentencing range without adequate explanation.
2. A central element of the appellants’ argument is that the judge recognized an applicable range of 12 to 24 months’ imprisonment in her judgment, but she did not see fit to follow it. The reality is very different. The judge conducted an exhaustive review of case law from across Canada on sentences imposed for luring punishable by indictment or summary conviction before *Friesen*[[59]](#footnote-59) and after, when the sentences imposed became harsher.
3. The judge noted that, before *Friesen*, the applicable range was between 6 months served in the community and 6 months in prison. Although it is more difficult to establish an exact range after *Friesen* due to the limited number of judgments, the judge nevertheless noted the observation of authors Hugues Parent and Julie Desrosiers that a sentence between 6 and 12 months appears to be the norm for luring of a short duration prosecuted summarily.[[60]](#footnote-60) She added, however, citing case law in support, that a sentence of imprisonment to be served in the community can be deterrent and punitive.[[61]](#footnote-61)
4. The judge’s analysis led her to declare that the non-custodial sentence (probation and community work) imposed in this case by the Court of Québec was demonstrably unfit. This conclusion must be read with paragraphs 162 *et. seq*. of her judgment in which she calculated the fit sentence. In that part of the judgment, she noted other elements essential to her analysis, for example, the respondent’s rehabilitation and the individualization of the sentence.
5. The appellants’ argument that the judge’s reasons are insufficient or inadequate to justify imposing a sentence outside the range is incorrect. First, this was not expressly raised as a ground of appeal. But even more important, the appellants disregard the fact that the judge was correct in finding that such a range had not been clearly established. Above all, the appellants ignore dozens of paragraphs of the judge’s meticulous analysis leading to her conclusion summarized in paragraphs 182 and 183. An appellate court must consider the reasons of the judgment under appeal globally.[[62]](#footnote-62) The reasons of the judgment under appeal are sufficient and command deference.
6. Above all, and to reiterate, the appellants erroneously argue that there is a range of 12 to 24 months that, at least in summary conviction matters, finds little support in the reported cases. For example, in *Rayo*,[[63]](#footnote-63) cited by the appellants, the 12 months imposed in a prosecution by way of indictment were due to much more serious circumstances than those in this case.The Court referred to the accused at the very beginning of the judgment as a [translation] “sexual predator” who was charged by way of indictment with a series of sexual offences, including luring, against two children. The 12 months imposed for luring was the mandatory minimum sentence. Constitutional validity was not raised. A careful reading of *Rayo* convinces the Court that the 4 months imposed on the respondent respect the principle of parity in sentencing, as required by section 718.2(b) *Cr. C*.
7. In particular, and bearing in mind the appellants’ argument that the Superior Court judge erroneously departed from a range of 12 to 24 months, it is relevant to recall these remarks made in *Friesen*on the subject of ranges and the standard of review:

[37]       This Court has repeatedly held that sentencing ranges and starting points are guidelines, not hard and fast rules (*R. v. McDonnell*, 1997 CanLII 389 (SCC), [1997] 1 S.C.R. 948, at para. 33; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 45; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 44; *Lacasse*, at para. 60). Appellate courts cannot treat the departure from or failure to refer to a range of sentence or starting point as an error in principle. Nor can they intervene simply because the sentence is different from the sentence that would have been reached had the range of sentence or starting point been applied (*McDonnell*, at para. 42). Ranges of sentence and starting points cannot be binding in either theory or practice, and appellate courts cannot interpret or apply the standard of review to enforce them, contrary to *R. v. Arcand*, 2010 ABCA 363, 40 Alta. L.R. (5th) 199, at paras. 116-18 and 273. As this Court held in *Lacasse*, to do so would be to usurp the role of Parliament in creating categories of offences (paras. 60-61; see also *McDonnell*, at paras. 33-34).

1. Recently, in *Parranto*,[[64]](#footnote-64) the Supreme Court noted that ranges are merely “guidelines” and that the choice to depart from them is a discretionary one.[[65]](#footnote-65) This choice cannot on its own justify appellate intervention.[[66]](#footnote-66) In addition, in *Friesen*, the Supreme Court noted that, notwithstanding the importance of denunciation and deterrence, rehabilitation and the low likelihood of reoffending may, in certain cases, weigh in favour of a more lenient sentence.[[67]](#footnote-67) We believe that this is the case here.
2. It is not surprising that a study of reported cases does not reveal a clearly defined sentencing range for the offence of luring, since this offence covers a broad range of conduct. This is in fact what prompted the Supreme Court to state, in *obiter*, that the offence of luring is one where the mandatory minimum is constitutionally vulnerable.[[68]](#footnote-68) For this reason, the argument that the judge departed from the “range”, if there is one, cannot be accepted, especially considering the *dicta* of the Supreme Court in *Friesen* and *Parranto*, cited above.
3. Even if a range of 12 to 24 months existed, the fact that it was not followed does not warrant the Court’s intervention, given the judge’s clear and well expressed reasons. Given the applicable standard of a palpable error, we also do not identify a reviewable error in the judge’s calculation of the fit sentence.

## Did the Superior Court err in law in concluding that section 172.1(2)(b) Cr. C. is constitutionally invalid under section 12 of the Charter?

1. Having decided that 4 months, rather than the mandatory 6 months set out in the *Criminal Code*, is the fit sentence, the judge nonetheless concluded that the difference between the two was not sufficient to justify declaring the mandatory minimum sentence inoperative.
2. Given that the minimum incarceration period of 6 months is 33% longer than what the judge considered fit in this case, at that stage she could have said that she agreed with the Court of Québec judge and declared the minimum sentence invalid. However, the assessment of what sentence is or is not grossly disproportionate or “so excessive as to outrage standards of decency”[[69]](#footnote-69) is owed deference.
3. The judge then turned to the second step of the analysis in accordance with *Lloyd*[[70]](#footnote-70)and *Nur*,[[71]](#footnote-71) and asked herself whether the minimum sentence of 6 months was grossly disproportionate with respect to reasonable hypothetical cases.
4. The judge examined two reasonable hypothetical cases, a judgment of the Nova Scotia Court of Appeal and another by the Ontario Court of Justice, as mentioned above. In *Hood*,[[72]](#footnote-72) the Nova Scotia Court of Appeal declared unconstitutional the mandatory sentence of 1 year under section 172.1(2)(b) *Cr. C*. for luring punishable by way of indictment.[[73]](#footnote-73)
5. This is the analysis in *Hood*:

[150]   For example, consider a first-year high school teacher in her late 20’s with no criminal record. She suffers the same mental health challenges as Ms. Hood. One evening, she texts her 15-year-old student ostensibly to inquire about a school assignment. Feeling manic, she directs the conversation from casual to sexual. They agree to meet that same evening in a private location where they fondle each other. That was their one and only sexual encounter.  Consider further a guilty plea, coupled with the teacher’s sincere remorse.

[151]   This scenario covers the elements for the (a) sexual interference and (b) luring (under 16) offences. If we were to consider instead a 17-year-old student, the (a) sexual exploitation and (b) luring (under 18) offences would be covered.

[152]   In our view, these are reasonable hypotheticals that are “foreseeably captured by the minimum conduct caught by the offence”. They are neither “remote” nor “far-fetched”.

1. The appellants argue that *Hood* is not a reasonably comparable case and that this hypothetical case should therefore be set aside:

[translation]

50. In light of the most recent teachings of the Supreme Court established in *Friesen*, the hypothesis based on *Hood*, a decision rendered before that judgment, cannot be accepted as a reasonable hypothesis potentially leading to cruel and unusual treatment, in particular because it does not deal with the harm suffered by the victim in any way, it suggests that the offence is less serious due to the adolescent’s *de facto* consent and the small age difference between the accused and the victim, and it trivializes the sexual assault that ensued, describing it as “fondling”.

[Citations omitted]

1. In *Friesen*, the Supreme Court, referring specifically to *Hood*,denounced the belief that sexual touching such as “fondling” (*caresse*) is less harmful to the victim than other forms of sexual violence that are generally considered more reprehensible.[[74]](#footnote-74)
2. We do not agree with the appellants’ argument that the hypothetical case in *Hood* should be set aside entirely for this reason. Indeed, even without the reference to “fondling”, it offers an example of less blameworthy conduct than the conduct described in *Rayo*, for example. The Supreme Court in *Friesen* rejected the theory of a “hierarchy of physical acts” in matters of sexual assault and instead recommended that courts look at the harm done to victims.[[75]](#footnote-75) Although we recognize the inherent harm of the sexual offence and strongly condemn these acts, there is no specific evidence, in this case, of the harm done to the victim.
3. Here, comparable factual circumstances are not difficult to imagine or identify in the case law. Take, for example, *R. v. Morrison*,[[76]](#footnote-76) where the accused posted an advertisement online seeking a “little girl”. A police officer posing as a 14-year-old girl answered the ad. Invitations to sexual touching led to a charge of luring on summary conviction.
4. In that case, even though it set quashed the conclusion of unconstitutionality of the Court of Appeal for Ontario, the majority of the Supreme Court refused to rule on the issue. However, it stated that “[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”.[[77]](#footnote-77)
5. The other hypothetical case cited by the judge is *Randall*:[[78]](#footnote-78)

[translation]

[223] The third and last case is *Randall*, where the accused was a 50-year-old father without a criminal record who was himself sexually abused during his youth. He had undergone therapy and had a low risk of reoffending. He developed an online relationship with an undercover officer posing as a 15-year-old adolescent. Their discussions were sexual and they agreed to meet. It was then that the accused was arrested. The Court sentenced him to 90 days to be served intermittently, along with 3 years’ probation including a curfew for the first year and the performance of 120 hours of community work.

[224] This third hypothetical also represents a situation where the mandatory minimum sentence of 6 months’ imprisonment is grossly disproportionate.

1. The appellants note that the judgment in *Randall* was rendered after the Court of Appeal for Ontario had declared invalid the mandatory minimum sentence for luring prosecuted by way of indictment in *Morrison*, a judgment that was overturned for other reasons by the Supreme Court. According to the appellants, the conclusion in *Morrison* formed part of the reasoning of the judgment in *Randall* and therefore should not be followed. However, since *Morrison*, this Court, in *Bertrand Marchand*,[[79]](#footnote-79) declared invalid the minimum sentence applicable to the offence of luring prosecuted by way of indictment*.* This neutralizes the distinction suggested by the appellants, and *Randall* appears to be an appropriate hypothetical case.
2. Given the judgment in *Bertrand Marchand*, the possibility that an offender must receive a sentence of 6 months when the offence is prosecuted by summary conviction proceedings, whereas another offender may receive a lesser sentence when prosecuted by indictment, may potentially lead to unjust and inconsistent situations. The appellants claim that such an argument applies only in the opposite scenario, where the minimum sentence applicable to prosecution by indictment is under review following a precedent declaring the minimum sentence on summary conviction invalid.[[80]](#footnote-80)
3. The appellants are incorrect. Given the declaration of invalidity of section 172(2)(a) *Cr. C*. in *Bertrand Marchand*, the respondent is subject to a minimum sentence of 6 months, whereas such a minimum no longer exists when the offence is prosecuted by way of indictment. Although the mode of prosecution falls within the Crown’s discretion, this situation offends our notion of consistency in light of the principle of parity in sentencing and individualization of sentences. It may also give rise to collateral consequences that have nothing to do with the circumstances of the commission of the offence, for example, an accused’s right to appeal an eviction order, in an immigration context, rendered following a conviction.[[81]](#footnote-81)
4. The appellants are not arguing that the mandatory minimum sentence in this case is saved by section 1 of the *Charter*. Nevertheless, we agree with the Superior Court’s analysis in this regard.
5. Absent a reviewable error, there is no reason to intervene.

**FOR THESE REASONS, THE COURT:**

1. **GRANTS** the application for leave to appeal on the deferred question;
2. **DISMISSES** the appeal.

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|  | | PETER KALICHMAN, J.A. |
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| Mtre Maxime Seyer-Cloutier | | |
| BERNARD, ROY (JUSTICE-QUÉBEC) | | |
| For the Attorney General of Quebec | | |
|  | | |
| Mtre Éric Bernier | | |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS | | |
| For Her Majesty the Queen | | |
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| Mtre Vincent Rondeau-Paquet | | |
| DESJARDINS COTÉ | | |
| For H. V. | | |
|  | | |
| Date of hearing: | November 19, 2021 | |

1. *R. c. H.V*., 2021 QCCS 837 [Judgment under appeal]. [↑](#footnote-ref-1)
2. Judgment under appeal, *supra* note 1 at para. 8. [↑](#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. Trial judgment, 540-01-080712-170, (21 November 2019). [↑](#footnote-ref-4)
5. Judgment under appeal, *supra* note 1 at para. 3. [↑](#footnote-ref-5)
6. *R. v. Guida*, 51 CCC (3d) 305, 1989 CanLII 7126 (C.A.) at 311 [*Guida*]; See also *R v. Grover,* 2020 SKCA 40 at para. 12 [*Grover*]; *R v. Steinkey*, 2019 ABCA 259 at para. 20 [*Steinkey*]; *Desbois c. R*., 2019 QCCA 1788 at para. 12 [*Desbois*]. [↑](#footnote-ref-6)
7. *R. c. Bertrand Marchand*, 2021 QCCA 1285 at para. 78 [*Bertrand Marchand*]; *R. c. Daudelin*, 2021 QCCA 784 at paras. 35–38 [*Daudelin*]; *R. c. Trottier*, 2020 QCCA 703 at para. 32 [*Trottier*]; *R. c. Lefrançois*, 2018 QCCA 1793 at para. 7 [*Lefrançois*]. [↑](#footnote-ref-7)
8. Judgment under appeal, *supra* note 1 at para. 7. [↑](#footnote-ref-8)
9. *Ibid.* at paras. 12–24. [↑](#footnote-ref-9)
10. *Ibid.* at paras. 26-30. [↑](#footnote-ref-10)
11. *Ibid.* at para. 26. [↑](#footnote-ref-11)
12. *Ibid.* at para. 32. [↑](#footnote-ref-12)
13. *Ibid.* at para. 33. [↑](#footnote-ref-13)
14. Judgment under appeal, *supra* note 1 at para. 34. [↑](#footnote-ref-14)
15. *Ibid.* at paras. 38 and 73. [↑](#footnote-ref-15)
16. *Ibid.* at para. 53. [↑](#footnote-ref-16)
17. *Ibid.* at paras. 43 and 79–81. [↑](#footnote-ref-17)
18. *Ibid.* at para. 58. [↑](#footnote-ref-18)
19. *R. v. Friesen*, 2020 SCC 9 [*Friesen*]. [↑](#footnote-ref-19)
20. *Friesen*, *supra* note 19; *Montour c. R.*, 2020 QCCA 1648. [↑](#footnote-ref-20)
21. Judgment under appeal, *supra* note 1 at para. 62. [↑](#footnote-ref-21)
22. *Ibid.* at para. 69. [↑](#footnote-ref-22)
23. *Ibid.* at para. 109. [↑](#footnote-ref-23)
24. *Ibid.* at para. 102. [↑](#footnote-ref-24)
25. *Ibid.* at paras. 107–108. [↑](#footnote-ref-25)
26. Judgment under appeal, *supra* note 1 at para. 128. [↑](#footnote-ref-26)
27. *Ibid.* at para. 132. [↑](#footnote-ref-27)
28. *Ibid.* at para. 137. [↑](#footnote-ref-28)
29. *Ibid.* at paras. 155, 159. [↑](#footnote-ref-29)
30. *Ibid.* at para. 166. [↑](#footnote-ref-30)
31. *Ibid.* at paras. 168–170. [↑](#footnote-ref-31)
32. *Ibid.* at para. 173. [↑](#footnote-ref-32)
33. *Ibid.* at para. 174. [↑](#footnote-ref-33)
34. *Ibid.* at para. 175. [↑](#footnote-ref-34)
35. *Ibid.* [↑](#footnote-ref-35)
36. Judgment under appeal, *supra* note 1 at para. 183. [↑](#footnote-ref-36)
37. *Ibid.* at para. 184. [↑](#footnote-ref-37)
38. Judgment under appeal, *supra* note 1 at para. 194. [↑](#footnote-ref-38)
39. *Ibid.* at para. 202. [↑](#footnote-ref-39)
40. *Ibid.* at para. 203. [↑](#footnote-ref-40)
41. *R. v. Hood*, 2018 NSCA 18 [*Hood*]. [↑](#footnote-ref-41)
42. *R. v. John*, 2018 ONCA 702. [↑](#footnote-ref-42)
43. *R. v. Randall*, 2018 ONCJ 470 [*Randall*]. [↑](#footnote-ref-43)
44. Judgment under appeal, *supra* note 1 at para. 222. [↑](#footnote-ref-44)
45. *Ibid.* at paras. 217, 218 and 224. [↑](#footnote-ref-45)
46. *Ibid.* at para. 237. [↑](#footnote-ref-46)
47. *Ibid.* at para. 241. [↑](#footnote-ref-47)
48. *Ibid.* at para. 259. [↑](#footnote-ref-48)
49. *Ibid.* at para. 263. [↑](#footnote-ref-49)
50. Judgment under appeal, *supra* note 1 at paras. 263–269. [↑](#footnote-ref-50)
51. *Guida*, *supra* note 6 at 311; see also *Grover, supra* note 6 at para. 12; *Steinkey*, *supra* note 6 at para. 20; *Desbois*, *supra* note 6 at para. 12. [↑](#footnote-ref-51)
52. *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130 [*Lloyd*]. [↑](#footnote-ref-52)
53. *R. v. Nur*, 2015 SCC 15 [*Nur*]. [↑](#footnote-ref-53)
54. *Daudelin*, *supra* note 7 at paras. 35-38; *Bertrand Marchand*, *supra* note 7 at para. 78; *Trottier*, *supra* note 7 at para. 32 and *Lefrançois*, *supra* note 7 at para. 7. [↑](#footnote-ref-54)
55. *Friesen*, *supra* note 19 at para. 5. [↑](#footnote-ref-55)
56. Judgment under appeal, *supra* note 1 at para. 163. [↑](#footnote-ref-56)
57. *Ibid.* at para. 175. [↑](#footnote-ref-57)
58. *Ibid.* at paras. 164–165, 168. [↑](#footnote-ref-58)
59. *Friesen*, *supra* note 19. [↑](#footnote-ref-59)
60. Judgment under review, *supra* note 1 at para. 72; *Montour*, *supra* note 20. [↑](#footnote-ref-60)
61. Judgment under appeal, s*upra* note 1 at para. 181, citing *R. v. Proulx*, [2000] 1 S.C.R. 61 at paras. 105 and 107. [↑](#footnote-ref-61)
62. *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at para. 16; *Serra c. R.*, 2014 QCCA 1894 at para. 17. [↑](#footnote-ref-62)
63. *R. c. Rayo*, 2018 QCCA 824. [↑](#footnote-ref-63)
64. *R. v. Parranto*, 2021 SCC 46 [*Parranto*]. [↑](#footnote-ref-64)
65. *Parranto*, *supra* note 64 at para. 36. [↑](#footnote-ref-65)
66. *Ibid.* at para. 36. [↑](#footnote-ref-66)
67. *Friesen*, *supra* note 19 at paras. 123–124. [↑](#footnote-ref-67)
68. *R. v. Morrison*, 2019 SCC 15 at para. 146 [*Morrison*]. [↑](#footnote-ref-68)
69. *Lloyd*, *supra* note 52 at para. 24, citing *Smith* at 1072. [↑](#footnote-ref-69)
70. *Lloyd*, *supra* note 52 at paras. 18 and 19. [↑](#footnote-ref-70)
71. *Nur*, *supra* note 53 at para. 78. [↑](#footnote-ref-71)
72. *Hood*, *supra* note 41. [↑](#footnote-ref-72)
73. *Hood*, *supra* note 41; *Randall*, *supra* note 43. [↑](#footnote-ref-73)
74. *Friesen*, *supra* note 19. [↑](#footnote-ref-74)
75. *Ibid.* at paras. 137–147. [↑](#footnote-ref-75)
76. *Morrison*, *supra* note 68. [↑](#footnote-ref-76)
77. *Morrison*, *supra* note 68 at para. 146; see also *Nur*, *supra* note 53 at para. 82; *Lloyd*, *supra* note 52 at para. 35. [↑](#footnote-ref-77)
78. *Randall*, *supra* note 43. [↑](#footnote-ref-78)
79. *Bertrand Marchand*, *supra* note 7. [↑](#footnote-ref-79)
80. As in *R. v. Alexander*, 2019 BCCA 100 at para. 53. [↑](#footnote-ref-80)
81. *Randall*, *supra* note 43 at 18. [↑](#footnote-ref-81)