

A Recent Change to the Child Luring Laws of the Criminal Code of Canada

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On March 15, 2019, the Supreme Court of Canada released an important decision that will change the substantive law underlying the prosecution of those who engage children for sexual activities.

In *R v Morrison*, the accused posted an ad on Craigslist's "Casual Encounters" section. The ad was titled "Daddy looking for his little girl – m4w – 45 (Brampton)".¹ A police officer, in what is essentially a sting operation, posed as a 14-year old girl named "Mia" and made contact with Morrison.² Over a two-month period, the accused invited Mia to touch herself sexually and proposed that they meet to engage in sexual activities.³ He was accordingly charged under s. 172(1)(b) of the *Criminal Code* which provides as follows:⁴

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

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

The offence Morrison was alleged to have facilitated by means of communication was the invitation of a person under the age of 16 years to sexual touching (ie. s 152).⁵

In response, Morrison raised a *Charter* challenge to s 172.1(3). Section 172.1(3) states that where there is evidence that the person with whom the accused is communicating was represented to the accused as being underage, then such constitutes "proof that the accused believed that the person was under age."⁶ Morrison claimed that this breached an accused's right to a presumption of innocent under s. 11(d).⁷

The Supreme Court Canada, in an 7-1-1 majority rule (but 8 concurring on that s. 172.1(3) *Charter* infringement), held that s 172.1(3) of the *Criminal Code* was an infringement of s. 11 of the *Charter* and could not be saved under s. 1.

During Morrison's trial, he testified that he believed he was engaged in role play with an adult female pretending to be a 14-year old girl, and that, further, Craigslist was an 18+ site.⁸

The following is a brief summary of the majority's rule.

¹ *R v Morrison*, 2019 SCC 15 at para 4.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid* at para 16.

⁵ *Ibid* at para 4.

⁶ *Ibid.*

⁷ *Ibid* at para 16.

⁸ *Ibid* at para 24.

Section 11 of the *Charter* provides that an accused be presumed innocent until proven guilty. The standard of proof is beyond a reasonable doubt. Section 11 is engaged when a given provision allows for a conviction despite existence of a reasonable doubt.⁹

The court states at Paragraph 52:¹⁰

Various provisions of the Code establish presumptions whereby proof of one fact is presumed to be proof of one of the essential elements of an offence. Any such presumption will comply with s. 11(d) solely if proof of the substituted fact leads “inexorably” to the existence of the essential element that it replaces ... Only then will there be no possibility that the substitution might result in the accused being convicted despite the existence of a reasonable doubt.

The court notes that the nexus requirement has a high standard. The link must be “inexorable”.¹¹

The particular reason as to why s. 11(d) is engaged is because the presumption of innocence is replaced with what is essentially a presumption of guilt. If the person with whom the accused is speaking to is presented as underage, the burden of proof is placed on the accused to exonerate himself. The Court stated that even if s. 172.1(3) is rebuttable, it engages s. 11(d) of the *Charter* because the presumption can be triggered by the smallest evidence which may not be inexorably connected to the presumed fact. The fact that the person was represented as underage is not an inexorable connection to the presumed fact that the accused believed the person to be underage. This is contrary to the rule that the Crown holds the burden of establishing “the guilt of the accused beyond a reasonable doubt before the accused must respond” (emphasis of the Court).¹²

Here, it is important to clarify what the test is. The test is not whether the accused believed the representation.¹³ The test is “whether the connection between the proven fact and the existence of the essential element it replaces is “inexorable”.”¹⁴ Given the lack of inexorable connection, s. 11(d) of the *Charter* is engaged, requiring a s. 1 *Charter* analysis.

Pressing and Substantial Objective and Rational Connection

There is a pressing and substantial objective as well as a rational connection to the objective: the purpose of s. 172.1(3) is to facilitate prosecution of child luring and to protect children from online sexual predators.¹⁵

Minimal Impairment

Section 172.1(3) fails on the minimal impairment test: the Crown failed to establish that without the presumption, the child luring provision (s. 172.1) cannot operate effectively.¹⁶ The Court held that a

⁹ *Ibid* at para 51.

¹⁰ *Ibid* at para 52.

¹¹ *Ibid* at para 53.

¹² *Ibid* at para 56.

¹³ *Ibid* at para 57.

¹⁴ *Ibid*.

¹⁵ *Ibid* at para 66.

¹⁶ *Ibid* at para 69.

finding of fact can be done at each trial and so the presumption is not needed. When the person to whom the accused is speaking to is presented as underage, the trier of fact can draw logical connection (based on all the surrounding facts) that the accused believed the representation.¹⁷ Since the presumption under s. 172.1(3) needlessly limits the s. 11(d) rights of the accused, it fails for want of minimal impairment.

Balancing

The Court does not believe that the deleterious effects of the presumption under s. 172.1(3) outweighs its salutary effects. The Crown failed to show this and “to the extent, if any, that the presumption actually results in additional convictions, it does so only by sweeping in accused persons whose belief as to the other person’s age may be the subject of a reasonable doubt in the mind of the trier of fact.”¹⁸

Conclusion

In sum, the court has held that the presumption under s. 172.1(3), triggered by the smallest amount of evidence, places a heavy burden of proof on the accused, thereby unjustifiably limiting their s. 11(d) *Charter* right. Therefore, s. 172.1(3) of the *Criminal Code of Canada* cannot be saved under a s. 1 *Charter* analysis. We can expect that the *Criminal Code of Canada* will be modified to account for this significant decision.

¹⁷ *Ibid.*

¹⁸ *Ibid* at para 72.