SUPREME COURT OF CANADA

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Case in Brief: *R. v. Bertrand Marchand*

Judgment of November 3, 2023 | On appeal from the Court of Appeal for Quebec
Neutral citation: 2023 SCC 26

The Supreme Court confirms that mandatory minimum sentences for child luring are unconstitutional.

Section 172.1(1) of the *Criminal Code* sets out the offence of child luring. This offence is committed when an adult uses telecommunication to target a child, or a person believed to be a child, for the purposes of committing another offence against that child, such as sexual exploitation, sexual assault, incest and child pornography. It is a hybrid offence, which means the Crown prosecutor can choose to proceed by indictment (a more serious offence) or by summary conviction (a less serious offence). The mandatory minimum sentence for child luring is one year's imprisonment if the offender is guilty on indictment and six months' imprisonment if the offender is guilty on summary conviction.

In the first case, Maxime Bertrand Marchand pleaded guilty to one count of sexual interference and one count of child luring. He met the victim in person in 2013 when he was 22 and she was 13 years old. For the following two years, they were in contact on social media, met in person and had illegal sexual intercourse four separate times. At the sentencing stage of the proceedings, Mr. Bertrand Marchand challenged the one-year mandatory minimum period of incarceration for persons found guilty of the indictable offence of child luring, claiming it was inconsistent with section 12 of the *Canadian Charter of Rights and Freedoms*, which protects against cruel and unusual punishment. The judge agreed with him, finding that a one-year mandatory minimum sentence would be grossly disproportionate to the sentence of five months' incarceration she imposed for luring to be served at the same time as his sentence for sexual interference. The majority of the Court of Appeal upheld both the sentence and the conclusion that the mandatory minimum sentence was unconstitutional. On appeal before the Supreme Court of Canada, the Crown asked the Court to substitute Mr. Bertrand Marchand's five-month sentence with a sentence of 12 months' imprisonment. It also asked the Court to find the one-year mandatory minimum sentence constitutional.

In an unrelated case, H.V., whose name cannot be disclosed due to a publication ban protecting the victim, pleaded guilty to one count of child luring after sending sexual text messages to the victim over a period of 10 days in 2017. He challenged the six-month mandatory minimum sentence of incarceration for child luring punishable on summary conviction on the basis that it violated section 12 of the *Charter*. The Court of Québec judge agreed with him, and instead, imposed a sentence of two years' probation and 150 hours of community service. On appeal, the Superior Court varied the sentence to four months' imprisonment and agreed that while the mandatory minimum sentence was not grossly disproportionate to H.V.'s sentence, it would be when applied to other reasonably foreseeable scenarios. The Court of Appeal upheld that decision. On appeal to this Court, the Crown did not challenge H.V.'s sentence, but it asked the Court to find the six-month mandatory minimum sentence is constitutional.

The Supreme Court has allowed the Crown's appeal in part in Mr. Bertrand Marchand's case and dismissed its appeal in the case of H.V.

The mandatory minimum sentences are grossly disproportionate in a range of foreseeable scenarios.

Writing for the majority, Justice Martin agreed with the courts below in both cases that the mandatory minimum sentences for luring a child set out in section 172.1(2)(a) and (b) of the *Code* are inconsistent with section 12 of the *Charter.* As she explained, invalidating the mandatory minimums did not mean that child luring was a less serious offence. In some cases, the appropriate penalty for child luring will be imprisonment for a period equal to or longer than that contained in the unconstitutional mandatory minimum sentences. That said, Justice Martin emphasized "the mandatory periods of incarceration apply to such an exceptionally wide scope of conduct that the result is grossly disproportionate punishments in reasonably foreseeable scenarios". She dismissed both appeals on this issue.

However, Justice Martin allowed the Crown's appeal with respect to the length of Mr. Bertrand Marchand's sentence. In her view, the first judge minimized the harm caused to the victim by failing to recognize the grooming

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that occurred and underestimated Mr. Bertrand Marchand's actions, resulting in minimizing the wrongfulness and distinct harms of the luring offence. For these reasons, Justice Martin increased the sentence from five months' to one year's imprisonment and said it should be served after rather than at the same time as his sentence for sexual interference.

Breakdown of the decision: ***Majority***: Justice Martin allowed the appeal in part in Mr. Bertrand Marchand's case and dismissed the appeal in H.V.'s case (Justices Karakatsanis, Rowe, Kasirer, Jamal and O'Bonsawin agreed) | ***Dissenting in part***: Justice Côté would have allowed the appeals.

More information: Decision | Case information | Webcast of hearing

Lower court rulings: Decision (Mr. Bertrand Marchand) (Court of Québec – in French only) | Appeal (Mr. Bertrand Marchand) (Court of Appeal for Quebec) | Decision (H.V.) (Court of Québec - unreported) | First appeal (H.V.) (Superior Court of Quebec – in French only) | Second appeal (H.V.) (Court of Appeal for Quebec)
