S.C.C. File No. 32829

# IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal of Alberta)

Between:

**CRAIG BARTHOLOMEW LEGARE**

Appellant
(Respondent)

- and -

**HER MAJESTY THE QUEEN**

Respondent
(Appellant)

---

## REDACTED FACTUM OF THE CROWN RESPONDENT ATTORNEY GENERAL OF ALBERTA PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

---


**JAMES C. ROBB, Q.C.**
Appeals Branch, Alberta Justice
3rd Floor North Bowker Bldg.
9833 - 109 Street
Edmonton, AB
T5K 2E8
Tel: (780) 427-5042
Fax: (780) 422-1106
email: james.robb@gov.ab.ca

Counsel for the Respondent

**HENRY S. BROWN, Q.C.**
Gowling Lafleur Henderson LLP
Suite 2600, 160 Elgin Street
Ottawa, ON
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
email: henry.brown@gowlings.com

Ottawa Agent for the Respondent

**LAURA K. STEVENS, Q.C.**
Dawson, Stevens, Duckett & Shaigec
Barristers & Solicitors
300 9924 – 106th Street
Edmonton, AB T5K 1C4
Tel: (780) 424-9058
Fax: (780) 425-0172
Email: lstevens@dsscrimlaw.com

Counsel for the Appellant

**COLLEEN BAUMAN**
Sack Goldblatt Mitchell LLP
Barristers and Solicitors
300 Metcalfe Street
Ottawa, Ontario K1P 5L4
Tel: (613) 482-2463
Fax: (613) 235-3041
email: cbauman@sgmlaw.com

Ottawa Agent for the Appellant

# TABLE OF CONTENTS

**PAGE**

## PART I: STATEMENT OF FACTS

### *(i) Overview of Case*

1. After a brief trial, the Appellant was acquitted of two charges: (a) On April 28, 2003, unlawfully inviting, counseling or inciting a person under the age of 14 years to touch, directly or indirectly, with a part of the body or with an object, the body of Craig Legare, contrary to s. 152 of the *Criminal Code* and; (b) on the same date, did, by means of a computer system, communicate with a person who was under the age of 14 years for the purpose of facilitating the commission of an offence under s. 151 or 152 with respect to that person, contrary to s. 172.1(1)(c) of the *Criminal Code*.

2. The Crown appealed both acquittals. As to the s. 152 charge, the Court of Appeal determined that the trial judge erred in his interpretation of that section in relation to both the *actus* and *mens* rea. Nevertheless, the appeal was dismissed because of the particularization of that count on the Indictment. With respect to the s. 172.1 charge, the Court concluded that the trial judge had also misinterpreted both elements of the provision and ordered a new trial on that charge, as the same problem of particularization did not arise.

3. The central issue in this case is the correct interpretation of s. s. 172.1 *Criminal Code*. The trial decision, while professing to acknowledge that the purpose of the legislation is to protect children, provided a restrictive approach to the interpretation in three ways: (a) a restrictive interpretation of s. 172.1, (b) introducing "luring" as a requisite element of the offence and; (c) defining secondary offences in a narrow way.

4. It is the position of the Crown Respondent that the critical questions are, **viewed contextually**, did an accused:

1. Communicate by computer with an underage child;
2. In a manner objectively capable of facilitating (making easier) an offence; the risk being that a child (presumptively vulnerable) may at some time succumb to invitations or directions for other offences; with physical contact not required.

3. For the purpose of facilitating, meaning with the intent or subjective foresight as to the substantial risk that a child's inhibitions may be lowered or may succumb to involvement in sexual offences.[1]

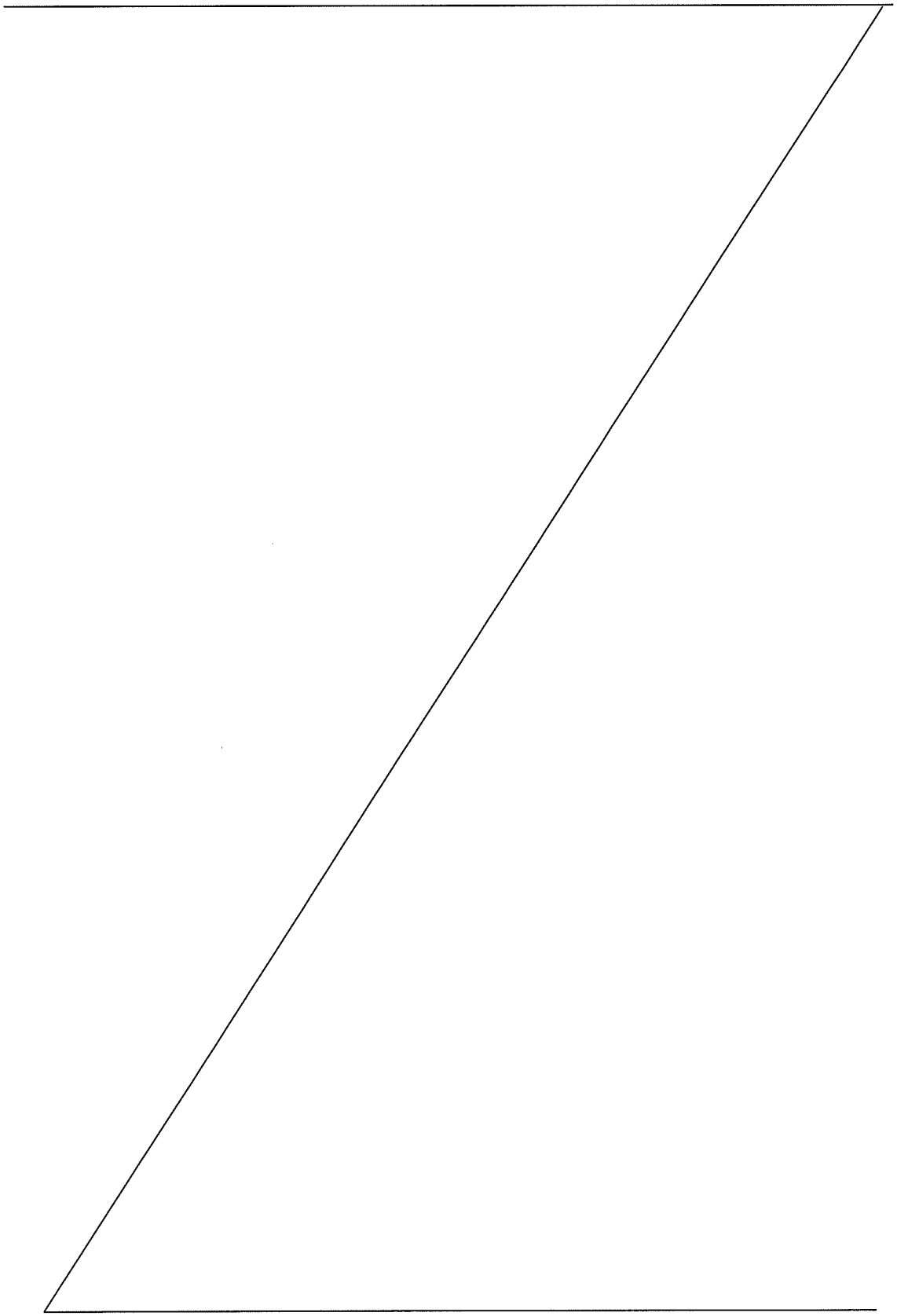
### *(ii) Statement of Facts*

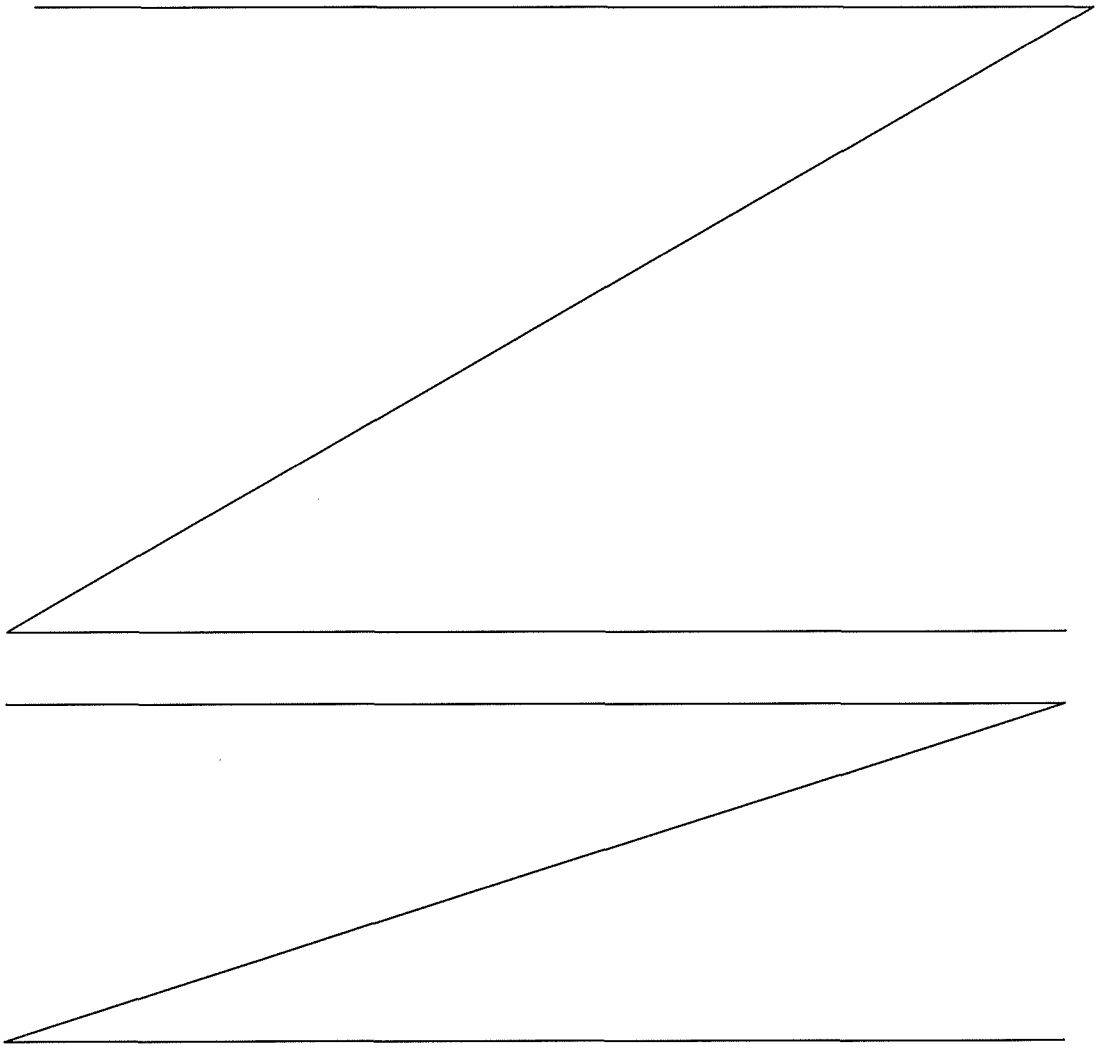
5. The facts were undisputed, the evidence consisting of an Agreed Statement of Facts[2] and a "chat log" of a conversation between the Appellant and a 12 year old girl.[3] No oral testimony was offered, whether for the Crown or the defence. The computer conversation was initiated through an MSN public chat room. Such rooms are open to the public with each room designating a topic, and there is no privacy.[4] While not recalling what public room she was in, the 12 year old was using the name "babystar". She was asked her age, sex, and location, and she responded that she was 13, female, and in Thornhill.[5] In the same public chat room she became engaged in a conversation with the Appellant, who used the name "oceans4surf". The girl asked the Appellant his age, sex, and location to which he responded that he was a 17 year old male from Edmonton. In fact, the Respondent was 32 years of age. To that stage there was no sexual content to the chat.[6]

6. A private chat, restricted to only those having access, was initiated.[7] There were two such chats between the girl and the Appellant, the first conversation not recorded. During it the Appellant again told the girl that he was 17. Sexual talk between the two occurred although the girl was unable to recall specifics of that conversation.[8] That private chat was brief, but a second one was commenced and a record of that conversation was retrieved by the girl's father, and preserved. The conversation lasted almost one hour, starting with the girl saying "*hey*" and the Appellant replying "*hi horny girl*".[9] The conversation record indicates the following:[10]

- ---

[1] The Crown Respondent accepts that this is a subjective test as per the ordinary rules in relation to mens rea which were not the subject of quarrel below.
[2] Joint Record (JR), Vol. I, Tab 22, p. 74
[3] JR, Vol. 2 (sealed), Tab 26, p. 115
[4] Agreed Statement of Fact, JR, Vol. I, Tab 22, para. 3
[5] Ibid., para. 8
[6] Ibid., para. 10-11
[7] Ibid., paras. 3, 12
[8] Ibid., para. 12
[9] Ibid.
[10] Appendix 2, Vol. 2 (sealed), Tab 26, p. 116-121



7. 

8. The Appellant then telephoned the girl twice. The first call was approximately 5 minutes after the Internet conversation ended. After the Appellant confirmed her identity; the remainder of the conversation was innocuous. The Appellant phoned back about 1 minute later and told the girl that he had to talk to her again. The girl was now apprehensive and, when the Appellant told her "*I would love to go down on you*", she hung up.[11]

[11] Agreed Statement of Fact, supra, JR, Vol. I, Tab 22, paras. 15-16

### *(iii) Reasons for Decision – Trial Judgment*

### *(a) Decision in Relation to Count 1 – s. 152 Criminal Code*

9. In total, one paragraph (para. 23)[12] dealt with the s. 152 charge, based on the trial judge's conclusion that there was no indication that the Accused invited the complainant to touch him for a sexual purpose within the meaning of the legislation; and s. 152 requires that if there are indications of counseling to touch oneself, it is an element of the offence that it be proven that the accused intended the girl to take the invitation to touch seriously.

### *(b) Reasons re Count 2 – s. 172.1(1)(c) Criminal Code*

10. At para. 9 of the reasons for decision, the trial judge indicated that was "*inclined to agree*" that an intention to consummate a meeting is not required but that "grooming" may suffice. However, he was of the view that there was no indication of grooming or luring. In his view, the legislation requires that the communication must be for the purpose of facilitating the commission of an offence under ss. 151 or 152. The trial judge concluded that "*luring*" is but a subset of "*exploitation*", they are not co-extensive and, to suggest that the conduct in this case amounts to "*luring*" would be, as per the defence submission, "*throwing the net too wide*".[13]

11. In his view, "*grooming*," typically exhibits 5 types of behaviors: (1) adult inquiring as to the child's home situation; (2) the adult inquiring as to whether the child has ever run away from home; (3) the adult engaging in sexually explicit conversation with the child; (4) the adult suggesting to the child that they meet; and (5) the adult suggesting to the child that he would be willing to fly to meet.[14] If those are present then it would be a "*clear cut case*" but without that it would not be. In his view what is necessary is that there must be more than "*dirty talk*" and the evidence must manifest an intention to facilitate the commission of an offence – a subjective test. He concluded that in some circumstances an actual meeting would not be necessary, nor an intention to meet. For example, they might agree to meet using a web cam. Therefore, it is conceivable that an adult could be convicted of luring to the extent that the adult was grooming the child to eventually masturbate. However, in his view, this was not the factual matrix before him.

---

[12] Reasons for decision, trial, JR, Vol. I, Tab 2
[13] Ibid., para. 10-11

12. At para. 18-21 the trial judge turned to the subject of intent, indicating that there must be an intent to "*lure for a specific purpose*". Describing the distinction as perhaps "*subtle*," the trial judge reiterated a distinction between an intent to commit the secondary offence and the intent to lure for that purpose, which is established through the grooming process as he previously defined it.[15] The trial judge was of the view that one cannot lure in a vacuum and there must be an object that the online predator hopes to obtain and for which he lures. Therefore, there must be an intention to lure for that purpose, which is left undefined, but which the Crown must prove.[16]

***(iv) Court of Appeal Decision***

***(a) As to the 152 Charge***

13. The Court of Appeal concluded that the trial judge erred in his interpretation of s. 152. First, the court concluded that there is nothing in the section that requires "*express*" communication given the words "*invite*", "*incite*" and "*counsel*", so that it captures communication that is express or implied. In their view it would be unduly restrictive of the three verbs to suggest that each of them must embody an express communication to presently achieve a prompt physical response by the child. This is an offence of communication not assault. Parliament intended to prevent the harm from happening. In their view the trial judge erred in his analysis on the *actus reus* portion of the crime.[17]

14. As to the *mens rea*, the court was of the view that the trial judge had also erred by requiring proof of intent that the invitation, incitement or counseling be taken seriously by the recipient – grafted from cases on uttering threats. Rather, they were of the view that the test of "*substantial and unjustified risk*" was the appropriate test.[18] It should be noted that the trial judge's position was the adoption of the test put forward by the defence.[19] It now appears that it has retreated from that position.[20] If so, then they have conceded error which, as explained below, taints the trial judge's analysis of s. 172.1.

---

[14] Ibid., para. 13
[15] Ibid., para. 22
[16] Ibid., para. 21
[17] JR, Tab 4, para. 35-38
[18] Ibid., para. 40-46
[19] Both at the trial level (JR, Vol. 1, Tab 2, para. 23) and appeal level (JR, Vol. I, Tab 4, para. 25) it was the Appellant's position that the Crown must prove an intent to take the communication seriously.
[20] Appellant's factum, para. 82

15. The Court of Appeal observed that predators can construct their words to convey the communication as a form of fantasy entertainment but if a trier of fact concludes that the child was being manoeuvred psychologically towards sexual touching by normalizing, casualizing and making enticing the behavior through the dirty talk, the necessary *mens rea* is present.[21]

16. Notwithstanding the errors as to the test and incomplete analysis, the Crown's appeal on this count was dismissed because of the particularization of the offence in the Indictment.[22]

***(b) As to the s. 172.1 Charge***

17. The Crown argued that the trial judge had erred in his interpretation of both the *actus reus* and *mens rea* of the offence. The Court of Appeal agreed on both points and ordered a new trial. The only ground of appeal before this Court is in relation to the *mens rea* issue.

18. In the Court of Appeal's view, s. 172.1 is a distinct offence which centres on *communication to facilitate*, the essence being communication with a person under the age of 14 for the purpose of facilitating the commission of one of the enumerated secondary offences. Its object is to protect children from online predators. The Appellant below argued that it had to be restricted to adult attempts to persuade a child to meet but the Court concluded that it would considerably narrow the ordinary and grammatical meaning of the word "facilitating", particularly in light of the multitude of ways in which a child's vulnerability can be exploited.[23]

19. Furthermore, the Court viewed the trial judge's considerable emphasis on the marginal notation "*luring*" to be misplaced, which resulted in a narrowing of the scope of "*facilitating*" by introducing a notion of enticing a child to move physically from one place to another. An attempt to get a meeting would be an attempted abduction and s. 172.1 would be unnecessary.[24]

20. "*Facilitating*" must mean something different and broader, capturing conduct that would not otherwise qualify as an attempt to commit one of the underlying offences. Particularly given the potential consequences for a child at a physical meeting, one object of the legislation is to minimize that potential. Furthermore, there are aims other than a physical meeting which may have attendant risks. Parliament, targeting the Internet, must have known that it is a world wide

---

[21] Court of Appeal, Reasons for Decision, JR, Vol. I, Tab 4, para. 47
[22] Ibid., para. 48-51
[23] Ibid., para. 52-55
[24] Ibid., para. 56-57

phenomenon and that predators can seek from diverse regions to create a climate of acceptance for abuse of children. Parliament must have intended to impede the ability of sex offenders from making children available for offences. An accused may use dirty talk to do so but may with it have the purpose of facilitating by means of gradually making the child available; and to do so, may target many children, sometimes failing.[25]

21. Having concluded that the trial judge erred in interpreting the external circumstances of the offence, the Court turned to the mental element. In their view the express language of the section requires that an intention to facilitate must be proven. Therefore a trial judge must consider whether the communication made it easier for the commission of an enumerated offence and whether the *mens rea* conformed to that situation. Again, they concluded that the trial judge parted from the correct interpretation by fixating on "*luring*", by which he added a dimension of present intention beyond facilitation – a present intent to bring about an opportunity to commit one of the secondary offences. While that may, and often is present, it is not a requirement.[26]

22. What was **not** in issue or dispute below was the subjective nature of the mental element. The departure point was the trial judge's direction that an intent to lure was necessary as opposed to the Court of Appeal's view that the intent must be to "*facilitate*".

---

[25] Ibid., para. 56-59
[26] Ibid., para. 63-67

## PART II: POINTS IN ISSUE

**Ground 1:** Did the Court of Appeal err in defining the *mens rea* required under section 172.1(1)(c) of the *Criminal Code?*

## PART III: ARGUMENT

**Ground 1**: Did the Court of Appeal Err in defining the mens rea required under section 172.1(1)(c) of the Criminal Code?

### *(i) Standard of Review*

23. Error of law, to which the correctness standard applies, includes the interpretation of statutes,[27] the misapplication of a correct legal standard to facts,[28] incorrect appreciation of the legal significance of facts premised upon an erroneous approach to, or treatment of evidence adduced at trial, and particularly where coupled with misapprehension of a legal principle.[29] In *R. v. Harper*,[30] this court held that if the record discloses a lack of appreciation of relevant evidence, and more particularly a complete disregard for such evidence, then it falls upon the reviewing tribunal to intercede.

### *(ii) Interpretation of Statutes*

24. In this case, the correct interpretation of s. 172.1 *Criminal Code* is the core issue. What follows, then, are three key principles of statutory interpretation that must be borne in mind.

(a) Large, Liberal and Purposive Interpretation

25. Statutes are to be given a fair, large, liberal interpretation as best ensures the attainment of its objects pursuant to s. 12 *Interpretation Act.*[31] While at one time penal statutes were subject to what has been called the "*strict construction rule*," this Court has stated that rigid application of the rule should be invoked only as a last resort to resolve ambiguity, when all methods of

---

[27] Housen v. Nikolaisen, [2002] 2 S.C.R. 235, para. 8, 31, 36, Respondent's Authorities (RA), **Tab 6**
[28] R. v. Wild [1971] S.C.R. 101 (SCC), at p. 111-12, 114, 116-17, RA, **Tab 51**; Housen v. Nikolaisen, supra, at para. 27, RA, **Tab 6**
[29] R. v. G.(B.), [1990] 2 S.C.R. 3, 1990 CarswellSask 156, para. 19, RA, **Tab 23**; R. v. Morin, [1992] 3 S.C.R. 286, 1992 CarswellAlta 276, para. 16-19, RA, **Tab 40**
[30] [1982] 1 S.C.R. 2, at p. 14, RA, **Tab 28**
[31] Reproduced at RA, **Tab 81**

determining legislative intent have been tried and failed.[32] The modern approach rejects the notion that any possible narrow interpretation is to be accepted, but rather addresses whether it is reasonable, or if there is any real ambiguity. It is not to be applied mechanically but rather, only to resolve ambiguities after giving the statute a broad and purposive approach.[33] As stated by the Supreme Court in *Re Rizzo and Rizzo Shoes Ltd.*:[34]

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

26. *R. v. McIntosh*,[35] confirmed the four steps of statutory construction: (1) the statute is to be read in its entire context so as to ascertain Parliament's intention, the object of the statute (the ends sought to be achieved); and the scheme of the Act (the relation between individual provisions of the Act); (2) obscure or ambiguous words are to be given a meaning that best accords with the intention of Parliament, the object and scheme of the Act, provided it is a reasonably capable of bearing that meaning; (3) if there is disharmony within the statute, then the ordinary meaning that produces harmony is to be given; (4) if obscurity or ambiguity or disharmony cannot be resolved objectively by reference to Parliament's intention, the object or scheme of the Act, then the most reasonable meaning is to be given.

27. Specifically in relation to offences aimed at the protection of children, appellate courts across Canada have rejected technical and artificial interpretations in favour of the broader, purposive approach.[36]

(b) Amendments to be Considered as Remedial

28. Related to the above is the concept that reform legislation is intended to be remedial.[37] The legislature is taken to avoid superfluous or meaningless words and as stated by Lamer, C.J.

---

[32] R. v. Hasselwander, 1993 CarswellOnt 87, [1993] 2 S.C.R. 398, at paras. 12-14, RA, **Tab 29**
[33] See, for example, R. v. Pare, [1987] 2 S.C.R. 618, at paras. 25-33, RA, **Tab 41**, which discusses the proper role of the rule and rejects a narrow construction of first degree murder provisions.
[34] [1998] 1 S.C.R. 27, at para. 21, RA, **Tab 46**; see also R. v. Sharpe, [2001] 1 S.C.R. 45, at para. 33, RA, **Tab 50**
[35] [1995] 1 S.C.R. 686, at para. 21, RA, **Tab 39**
[36] See R. v. Rhynes, [2004] CarswellPEI 60 (CA), at para. 8-11, RA, **Tab 45**; R. v. Gray, 2004 CarswellOnt 4100 (CA), at para. 7, RA, **Tab 27**; R. v. Fong, 1994 CarswellAlta 697 (Alta. CA), at para. 10, RA, **Tab 22**, leave refused [1994] SCCA No. 523
[37] Clarke v. Clarke, [1990] 2 S.C.R. 795; 1990 CarswellNS 49, at paras. 21-24, RA, **Tab 5**; R. v. Gladue, [1999] 1 S.C.R. 688, at para. 31, 33-34, RA, **Tab 24**

in *R. v. Proulx,*[38] *"..no legislative provision should be interpreted so as to render it mere surplusage"*. Parliamentary intention requires the precept that Parliament must be taken to be aware of the social and historical context in which it makes its intention known[39] and; a knowledge of existing law.[40]

29. This Court has specifically noted that children under the age of 14 are extremely vulnerable to sexual exploitation and the *Criminal Code* provisions are designed to address their special vulnerability; specifically holding that the protection of children is a universally accepted goal.[41]

(c) In a Manner Complying With International Obligations

30. This Court has consistently held that Canadian law must be interpreted to comply with Canada's international treaty obligations, and specifically in relation to obligations to protect children.[42] The most significant international convention regarding the rights of children is the United Nations *Convention on the Rights of the Child* (the "UNCRC").[43] The UNCRC is the most widely ratified and accepted human rights treaty of all time. It was ratified with one reservation by Canada in 1991. Only Somalia and the USA have failed to ratify.[44]

31. The Preamble to the UNCRC declares: *"the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection."* Of particular note, are Convention Article 34 (protection of children from all forms of sexual abuse and exploitation, including the inducement or coercion of a child to engage in any unlawful sexual activity and exploitative use of children in unlawful sexual activities; Article 35 (prevention of child abduction); and Article 36 (protection of children from all forms of exploitation).

---

[38] [2000] 1 S.C.R. 61, at para. 28, RA, **Tab 43**; see also R. v. Kelly, [1992] 2 S.C.R. 170, at para. 34-36, 44, AA, Tab 11, and R. v. Sharpe, supra, RA, **Tab 50**, at para. 45
[39] Willick v. Willick, [1994] 3 S.C.R. 670, at paras. 44-47, 49-50, RA, **Tab 54**
[40] 2747 – 3174 Quebec Inc. v. Queb., [1996] 3 S.C.R. 919, at para. 238, RA, **Tab 1**
[41] R. v. Sharpe, supra, at paras. 172, 175, RA, **Tab 50**; see also R. v. Deck, 2006 CarswellAlta 365 (Alta. CA), para. 29, RA, **Tab 17**
[42] Canadian Foundation for Children Youth and the Law and Canada, [2004] 1 S.C.R. 76, at para. 31, RA, **Tab 4** Baker v. Canada, [1999] 2 S.C.R. 817, at paras. 69-70, **Tab 2**
[43] Reproduced at RA, **Tab 74**
[44] Muncie, J., The Globalization of Crime Control – the case of youth and juvenile justice, in Theoretical Criminology (2005), RA, **Tab 67**, at p. 45

32. These obligations are specifically germane to the issues in the within appeal. Specifically within the context of sentencing of s. 172.1 and child pornography offences, courts have recognized the significance of the international obligations in relation to children.[45]

***(iii) S. 172.1 Criminal Code***

***(a) Introduction***

33. In *R. v. Hamilton*[46] a majority of this Court observed: *The Internet provides fertile ground for sowing the seeds of unlawful conduct on a borderless scale.* This has clearly been recognized in the context of the necessity of protecting children from online predators. While the Court was sympathetic to the need for a prophylactic response, it was also of the view that Parliament must ultimately respond to the Internet dangers, if there is to be expansion of protection.

34. Parliament, in relation to the online sexual exploitation of children, has expressly done so. In doing so, Parliament has attempted to address the critical need to protect children from online sexual dangers. The danger is unprecedented in its potential scope as pornographic images obtained from a child can be irretrievably circulated world wide with the push of a button. Children can be sexually exploited behind the veil of secrecy and anonymity that the Internet provides. The threat is clear and the Parliamentary response was clear and directed at prohibiting online sexual exploitation.

35. Both at the trial level and appellate level below the Crown filed extensive material which we will attempt to briefly summarize. It has been clearly and internationally recognized that the existence of over 100,000 chat lines worldwide has proliferated the dangers to children.[47] Internet communication itself potentially exposes children to harm in and of itself. Additionally, it is recognized that online communication can expose children to a range of harms from serious to the utmost seriousness: (a) abduction and international trafficking in women and children for prostitution; (b) sexual exploitation (usage by perpetrators to contact children for both online and physical meetings in which children are emotionally and sexually abused); (c) transmission and

---

[45] R. v. Schultz, 2008 CarswellAlta 1768 (QB), para. 33-36, 77, RA, **Tab 49**
[46] [2005] 2 S.C.R. 432, para. 30, AA, Tab 9
[47] Hughes, the Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children (2002), 13 Hastings Women's Law Jo. 127, RA, **Tab 65**, at p. 138

obtainment of child pornography (through usage of web cams attached to the computer) and (d) harassment and intimidation.[48]

36. With over 1 billion people now logging into cyberspace, and with children doing so in increasing numbers, the consequential dangers and challenges to protecting children are clearly recognized.[49] As has been noted, cyberspace offers adults intent on abuse access to larger pools of potential targets as well as an enormous library of materials related to abuse of children and violence.[50]

37. Those targeted, primarily girls, are most often troubled or have difficult relationships with parents, suffering from depression and troubling life, low self esteem, emotional distress, impoverishment events rendering them particularly vulnerable to online and real life sexual exploitation, but also making them easier to discredit.[51] The long term outcomes of sexual exploitation via the Internet can persist into adulthood with higher levels of anxiety, depression, substance abuse, eating disorders, relationship problems and suicide ideation.[52] With respect to the offender, a 6 year study indicates that:[53] (a) 64% are professionals; 95.1% of internet related sexual exploitation cases are male with ages ranging from 15-66; the majority are in the age bracket of 30-39; they engage in discussion with children online and use skills at manipulation and coercion for sexual purposes with a wide range of sexual interests.

38. The magnitude of the problem and consequent dangers cannot be under-estimated. Comprehensive studies in both Canada[54] and the United States[55] establish the inherent dangers. In the Canadian study almost all children, starting at elementary school age have Internet access;

---

[48] Ibid., at pp. 138-141; Safely Connected: Strategies for Protecting Children and Youth From Sexual Exploitation Online, The Centre for Innovation Law and Policy White Paper, paper prepared for International Symposium (Oct. 2005), RA, **Tab 70**, at pp. 3-11; ECPAT International, Violence Against Children In Cyberspace (2005) prepared for the United Nations, RA, **Tab 61**, at p. 8-15

[49] ECPAT, ibid., at p. 20

[50] Ibid., at p. 28-29

[51] Wolak, Mitchell and Finkelhor, Escaping or Connecting? Characteristics of youth who form close online relationships, (2003) Jo. of Adolescence 105-119, RA, **Tab 77**, at pp. 6-7, 9-13; Dombrowski, LeMasney, Ahia, Dickson, Protecting Children From Online Sexual Predators: Technological, Psychoeducational and Legal Considerations (2004), 35 Professional Psychology: Research and Practice 65, RA, **Tab 60**, at p. 4 (online version)

[52] Dombrowski, et al, ibid., at p. 1

[53] Alexy, Burgess, and Baker, Internet Offenders: Traders, Travelers and Combination Trader-Travelers (2005), Jo. of Interpersonal Violence 804, RA, **Tab 55**, at pp. 805-810

[54] Environics Research Group, Young Canadians in a Wired World (2001) prepared for the Government of Canada, RA, **Tab 62**, at pp. 7, 9-10, 15-19, 23, 25-26, 30-35, 63-65, 70-72, 75-80

youths are more likely to give out personal information; 24% of youths in chat rooms are sent pornography; almost half receive unwanted sexual comments (particularly girls); one-quarter receive requests for physical meets. In the U.S. study it was indicated that one in five youths receive a sexual solicitation; girls targeted twice as much as males, with 22% under the age of 14; a third receive aggressive sexual solicitation whether to meet, or be called on the telephone or to have mail sent, or money or gifts; a quarter had unwanted exposure to pictures of naked people or sexual acts.

39. Such statistics and studies can be starkly stated and clinically examined. What must not be lost sight of is that we are talking about a particularly vulnerable group of victims – children. The *Criminal Code* provisions recognize not only the harm that comes from engaging children in sexual talk or activity over the Internet but that the Internet process can lead to a child being placed in a dangerous situation that can result in a profound violation of his/her physical and sexual integrity.

40. Adult perpetrators do not use physical threats but rather use a process of psychological manipulation most commonly referred to as "*grooming*".[56] That process involves gaining the affection, interest and trust of children/adolescents within the target group. The contact may advance from email to gifts or pictures and, if the child is receptive may move into more overt sexual contact – sexually explicit conversation or material. It may, or may not, then rise to the level of physical activity.[57] In its essence it involves forming a bond with a child victim and introducing a sexual element.[58] Without doubt, it can, and does – frighteningly so – progress to pressing for physical meets. But, as will be discussed below, it can fall far short of that, with equally devastating consequences.

41. In the United Kingdom it has been recognized[59] that the process of grooming involves building up a relationship to entice into sexual activity. It was also recognized that using the

---

[55] Finkelhor, Mitchell and Wolak, Online Victimization: A Report on the Nations Youth (2000), prepared for the U.S. Congress, RA, **Tab 63**, pp. ix-x, 1-19
[56] Dombrowski, supra, RA, **Tab 60**, at p. 4
[57] Ibid., at pp. 3-4
[58] Walsh and Wolak, Nonforcible Internet-Related Sex Crimes With Adolescent Victims: Prosecution Issue and Outcomes (2005) Child Maltreatment 260, RA, **Tab 76**, at p. 261, 263-65; Dombrowski, et al, supra, RA, **Tab 60**, at pp. 3-4, Protecting Children From Online Sexual Predators
[59] See Childnet International, Online Grooming and UK Law, RA, **Tab 57**, p. 2-4

crime of attempt, both for legal and ethical (requiring some child to continue in a position of risk) reasons, is unsatisfactory. In *R. v. Mansfield*,[60] the English Court of Appeal stated:

> ***19.*** *That leaves us unpersuaded. The law is there to protect young girls against their own immature sexual experimentation and to punish much older men who take advantage of them. We think that for the sexual offences three years is the correct sentence on all counts.*

42. This was confirmed in *R. v. Raza*[61] a case dealing with the online exploitation of a 13 year old girl with hearing and behavioral problems. More recently, in *R. v. Robson*[62] the English Court of Appeal returned to the subject stating:

> ***6*** *It is important in analysing the meaning of this section to identify certain significant features in it. It is plain that the section introduces an offence which amounted to something* ***more than and wider than a criminal attempt*** *under the Criminal Attempts Act 1981.* ***Were it not so, there would be no purpose in introducing an offence under section 14.*** *In relation to offences under sections 9 to 13 the Criminal Attempts Act 1981 would have served that purpose. [emphasis added]*

43. Similarly, in the United States, the Court of Appeals of New York, rejected a wide ranging constitutional challenge to its penal law dealing with internet sexual exploitation of children.[63] That case dealt with charges of promoting an obscene sexual performance by a minor, arising from an undercover operation in which a 50 year old talked sexually for 2 hours, and encouraged masturbation. In rejecting the challenge the Court embraced the broad purposive approach:

> *The statute was enacted to address the growing concern that pedophiles are using the Internet as a forum to lure children (see, Governor's Mem. approving L. 1996, ch. 600, 1996 McKinney's Session Laws of N.Y., at 1900-1901).*

And:

> *The primary legislative purpose behind the statute is "to protect the children of this State from high-tech cybersex abuse and actual sexual abuse" (Governor's Mem. approving L. 1996, ch. 600, 1996 McKinney's Session Laws of N.Y., at 1901). The State plainly has a "compelling" interest in protecting children* ****683***

---

[60] [2005] EWCA Crim. 927 (CA), para. 19, RA, **Tab 38**

[61] [2007] 1 Cr. App. R. (S.) 16 (CA), para. 11, RA, **Tab 44**; and see also R. v. Butlin, [2008] Cr. App. R. (S.) 8 (CA), para. 27, RA, **Tab 14** - this case deals with an accused who induced a 14 year old boy, during online chat, to provide his telephone number and then arranged a meeting with him.

[62] [2009] 1 W.L.R. 713 (CA), para. 6, RA, **Tab 47**

[63] People v. Foley, 94 N.Y.2d 668 (CA), p. 675-676 and 682 (para. 15/16), RA, **Tab 9**

*from sexual exploitation in order to safeguard their " 'physical and psychological well-being' "*

44. In Australia, the Victorian Law Reform Commission[64] specifically recognized that current offences (including attempt) were inadequate to deal with "*grooming*" and specifically recommended that it be illegal to solicit for future sexual acts. In Queensland[65] a specific law against adults grooming children for sexual purposes was introduced in 2003. Sexual purposes were not restricted to acts involving physical acts or requiring proof that a particular sexual act was intended or possible. Rather, it recognized that online grooming has a sexual purpose and, therefore, it is the online facilitation that is the problem to be dealt with.

45. A Report for the Queensland Parliamentary Library[66] exhaustively examined the recommended provision which created a new offence to use electronic means with the intent to procure a child under 16 to commit a sexual act or to expose to pornography, specifically noting that such a crime should not be viewed as merely a technological extension of traditional crimes (such as attempt) given the existence of worrying gaps through online grooming and similar tactics.[67] The same report noted that the Australian Capital Territory parliament specifically amended its *Crimes Act* to proscribe using electronic means to suggest to a young person that the young person commit or take part in, or watch someone else committing or taking part in, an act of a sexual nature.[68]

46. In New Zealand,[69] a parliamentary committee noted that the proposed legislation had been criticized for serious omission in the bill to include sexual grooming as an offence. It describes sexual grooming as a particularly insidious strategy employed to create an environment with a child that will allow for sexual advances later in life – often beyond criminal reach. It noted that in 2003, the United Kingdom introduced a specific provision to cover sexual grooming.

---

[64] Sexual Offences, Final Report, p. 450-51, RA, **Tab 71**; and Victorian Law Reform Commission, Sexual Offences Final Report, Summary and Recommendations, p. 14, RA, **Tab 75**
[65] Queensland Police Stings in Online Chat Rooms, Trends and Issues in Crime and Criminal Justice, July 2005, No. 301, p. 1-2, 4, RA, **Tab 69**
[66] Nicolee Dixon, Catching Cyber Predators: the Sexual Offences Amendment Bill 2002, RA, p. 4, 8, **Tab 68**
[67] Ibid., at p. 10-11
[68] Ibid., at p. 12-13
[69] Commentary to the Crimes Amendment Bill (No. 2), p. 24, RA, **Tab 58**

47. The above studies and articles are more than a theoretical or alarmist view of the internet world. The array of situations can be demonstrated through existing internet exploitation cases. Some examples should suffice.

48. In some cases, the internet communication can result in a meeting with devastating consequences – in *R. v. Deck*,[70] a 13 year old, somewhat mentally challenged girl engaged in online communication resulting in meetings with unprotected vaginal and anal intercourse. The Court specifically noted the extreme vulnerability of the girl, the risk of disease and pregnancy and the physical and emotional harm done. Similarly, in *R. v. Lithgow*[71] online chat, which became increasingly sexual, led to sex between a male in his 50's and a 14-15 year old girl. In *R. v. Brown*,[72] a 13 year old was abducted following online grooming.

49. Other cases factually occupy a middle ground position where the particular end object is a meeting which is frustrated, usually through parental/police intervention or the usage of undercover operations. Some examples include: *R. v. P.H.*,[73] in which a 45 year old posed as a 15 year old boy and entered into chats with three 13 year old girls. He sent them webcam images of himself masturbating, attempted to solicit similar images from the girls, and then attempted to arrange a meeting at a motel so that he could pay them for explicit photographs. After the girls informed their parents, police intervened and arrested him at the motel. In *R. v. Daniels*[74]the accused was seeking young girls for sex. An undercover operation led to online discussion with the accused offering money, liquor and drugs for sex. A meeting was arranged but never occurred.

50. In *R. v. Folino*[75] a 35 year old had chats with an undercover officer with repeated suggestions for a meeting and explicit indications of sex that would then occur. He wanted the "girl" to digitally penetrate herself in advance of the meeting and sent a picture of himself and his penis via the computer. He was arrested at the meeting place. In *R. v. Carratt*[76] a 37 year old made contact via computer with a 13 year old boy, entering into graphic sexual chat and

---

[70] Supra, RA, **Tab 17**, para. 20, 29-31
[71] 2007 CarswellOnt 7380 (CJ), para. 2-3, RA, **Tab 36**
[72] 2006 CarswellOnt 2329 (SCJ), RA, **Tab 13**
[73] [2004] A.J. No. 961 (PC), RA, **Tab 42**
[74] 2008 CarswellAlta 1729 (PC), RA, **Tab 16**
[75] 2005 CarswellOnt 5990 (CA), RA, **Tab 21**
[76] [2005] A.J. No. 743 (PC), RA, **Tab 15**

masturbating via web cam so the boy could see. The father discovered this and pretending to be the boy arranged a meeting. He was arrested there with latex gloves. In *R. v. Horeczy*[77] a 42 year old male posed as a younger male in order to secure "dates" with girls under 18 – one victim was 13; another suffered from FAS and had the mental age of an 11 year old. Other cases have similar patterns of older males entering into graphic talk, sending pictures of exposed penises, and being arrested at a meeting spot by police.[78]

51. Still other cases demonstrate that the offence can be committed entirely via computer, yet with potentially equally devastating consequences. For example, in *R. v. Innes*[79] the accused posed as a 16 year old girl and coaxed a 13 year old and a 14 year old into showing themselves via webcam. Unbeknownst to them he was recording it. He then instituted a process of extortion to induce further sexually explicit videos to be transmitted to him – he was able to determine their locales and threatened to send the videos out over the internet, particularly to family and friends.

52. In *R. v. M.(J.A.)*[80] the accused was sending messages, exposing himself, and masturbating, via web cam, to someone whom he thought was a thirteen year old girl. He was also sending images of him having sex with his daughter to others. In *R. v. Bono*[81] the 52 year old accused, posing as a 16 year old, had no intention to meet but was using the online chat with a 14 year old girl to urge her to provide him with images of her masturbating. She did so and they were on his computer available for uploading onto the internet and susceptible to online hackers and intrusion. In *R. v. J.(C.)*[82] a 42 year old male, posing as a 17 year old, entered into explicit talk with a 13 year old and, after a number of chats, had her exposing her breasts by web cam and suggesting she fondle herself.

53. What the above cases demonstrate is that online chat is used to groom children to facilitate a wide range of potential sexual offences, which can range from sexual acts at physical meetings, inducing sexual/masturbatory activity, or obtaining/transmitting child pornography,

---

[77] 2006 CarswellMan 421 (PC), RA, **Tab 31**
[78] R. v. Kydyk, 2005 CarswellOnt 6530 (CJ), RA, **Tab 35**; R. v. Jarvis, 2006 CarswellOnt 4863 (CA), RA, **Tab 33**; R. v. Arrojado, 2008 CarswellOnt 6323 (CJ), RA, **Tab 11**
[79] 2008 CarswellAlta 431 (CA), RA, **Tab 32**
[80] 2007 CarswellSask 233 (PC), RA, **Tab 37**
[81] 2008 CarswellOnt 6713 (SCJ), para. 5, RA, **Tab 12**
[82] 2005 CarswellOnt 10455 (CJ), RA, **Tab 34**

entirely by computer. Thus far, the attempts to limit the interpretation of s. 172.1 to the first category only (inducing a physical meeting) have failed, and should continue to do so.

54. In light of the pressing concerns with respect to protecting children from online sexual exploitation, the correct interpretation of s. 172.1 is of paramount importance. That interpretation will impact not only the instant charge, and future similar cases, but also has major implications for charges of transmitting child pornography, which is an offence pursuant to s. 163.1 of the *Code.*[83] It is expressly caught by s. 172.1(1)(a) which expressly and unambiguously forbids communication via a computer system for the purpose of facilitating the commission of an offence under s. 163.1. S. 163.1(1)(b) and (1)(c) contain a broad definition of child pornography, which includes written and visual material.

55. The trial judge's narrow interpretation of s. 172.1 put in danger prosecutions in relation to child pornography. The trial judge's approach hinged on a narrow interpretation of s. 172.1; and the characterization of online chat (which can include transmitted images and typed words) as being mere "dirty talk". This gives rise to the potential that clearly criminally liable words and acts would not be caught.

### *(b) Canada's Response – Breadth and Purpose*

56. Canada, which had previously amended its criminal legislation to recognize the particular gravity of sexual crimes against children,[84] responded to the Internet aspect in 2002 by introducing the offence of sexual Internet communication (s. 172.1 CC). That section has now been the subject of two appellate reviews; one being the decision under appeal and; the second being the decision of the Ont. CA in *R. v. Alicandro.*[85]

57. Normally, counsel refer the Court to the convenient commercial forms of the *Criminal Code*, but in this case, the original source is important, given the interpretation issues at play. It is important for two reasons. First, it speaks to its intended breadth, and secondly; to its constituent elements. Each is important for one informs the other.

---

[83] S. 163.1 is at Appellant's Factum (AF), Part VII, pp. 42-46

[84] Reforming its legislation by specifically recognizing sexual crimes against children through offences such as sexual interference (s. 151), invitation to sexual touching (s. 152), sexual exploitation (s. 153) – AF, Part VII, pp. 38-42; and limiting age of consent to those 14 and older (s. 150.1(2) *Criminal Code.*) – RA, **Tab 79**

[85] 2009 ONCA 133 (CA), para. 19, 36-38, 45-46, AA, Tab 3

58. S. 172.1 was introduced pursuant to the *Criminal Law Amendment Act, 2001*.[86] The summary to that statute indicates that the Code was being amended for the purpose of: "*adding offences and other measures that* ***provide additional protection*** *to children from sexual exploitation, including* ***sexual exploitation*** *involving use of the Internet*". The breadth of that statement of intent should be noted. As summarized by Sullivan and Driedger,[87] given the traditional importance of legislative intent in interpretation, "*...an explanation of purpose that emanates from the legislature itself carries a desirable authority*".

59. In *Alicandro*[88] it was held that the section must be interpreted in light of the obvious aim of the legislation to prevent harm to children and that any interpretation must advance that object and not impair the protection to children afforded by that section. At para. 36 it is stated:

> *36 The language of s. 172.1 leaves no doubt that it was enacted to protect children against the very specific danger posed by certain kinds of communications via computer systems.[FN6] The Internet is a medium in which adults can engage in anonymous, low visibility and repeated contact with potentially vulnerable children.* ***The Internet can be a fertile breeding ground for the grooming and preparation associated with the sexual exploitation of children by adults****. One author has described the danger in these terms:*
>
> > *For those inclined to use computers as a tool for the achievement of criminal ends, the Internet provides a vast, rapid and inexpensive way to commit, attempt to commit, counsel or facilitate the commission of unlawful acts. The Internet's one-too-many broadcast capability allows offenders to cast their nets widely. It also allows these nets to be cast anonymously or through misrepresentation as to the communicator's true identity. Too often, these nets ensnare, as they're designed to, the most vulnerable members of our community -- children and youth.*
> >
> > . . . . .
> >
> > *Cyberspace also provides abuse-intent adults with unprecedented opportunities for interacting with children that would almost certainly be blocked in the physical world. The rapid development and convergence of new technologies will only serve to compound the problem. Children are the front-runners in the use of new technologies and in the exploration of social life within virtual settings.[FN7]* [emphasis added]

60. Other courts, also specifically dealing with s. 172.1(c) have taken the same position.[89] In *R. v. Pengelley*[90] the Court noted:

---

[86] Pertinent provisions reproduced at RA, **Tab 80**
[87] Sullivan and Driedger On the Construction of Statutes (2002), p. 296, RA, **Tab 72**
[88] R. v. Alicandro, supra, para. 19, 36-38, 45-46, AA, Tab 3

> *77 Children are vulnerable members of Canadian society: Canadian Foundation for Children (2004), 180 C.C.C. (3d) 353 (S.C.C.) at para. 58. Protecting children from harm has become a universally accepted goal: Winnipeg Child & Family Services (Central Area) v. W. (K.L.), [2000] 2 S.C.R. 519 (S.C.C.), at 563-4. "The state is charged with the responsibility of protecting its children": R. v. Alicandro, [2009] O.J. No. 571 (Ont. C.A.) at para. 38.*
>
> *78 Included in the House of Commons Debates, 054 (3 May 2001) at 1620 (Hon. Anne McLellan), when describing the introduction of the s. 172.1 crime, are these remarks by the Minister:*
>
> > *First I will deal with the proposed amendments to better protect our children. The provisions that deal with protecting children respond to the government's commitment in the Speech from the Throne to safeguard children from criminals on the Internet and to ensure that children are protected from those who would prey upon their vulnerability. They also respond to a consensus of ministers responsible for justice at the last FPT meeting to create an offence of Internet luring.*
> >
> > *The Internet is a new technology that can be used to stimulate the communication of ideas and facilitate research, but, as with any instrument, when placed in the wrong hands it can be used for ill and to cause harm. Canadians will not tolerate a situation where individuals, from the safety and secrecy of their house, use the anonymity of the Internet to lure children into situations where they can be exploited sexually.*
> >
> > *The new offence seeks to address what has been reported as a growing phenomenon not only in our country but globally. It criminalizes communicating through a computer system for* ***the purpose of facilitating*** *the commission of a sexual offence against a child or the abduction of a child. [emphasis added]*[91]

61. Similarly, in *R. v. Harvey*[92] a 61 year old entered into online "chat" with someone he thought was a 13 year old girl, but in fact, was an undercover officer. He was eventually arrested at a proposed meeting site. The court said of s. 172.1(c):

> *19 Section 172.1(c) prohibits electronic communication of the child when such communication is for the purpose of facilitating the commission of one of the offences enumerated. In my view, the key word of the section is the use of 'facilitating.' The word facilitate is defined in the Webster dictionary as "to make easy or less difficult, to free from difficulty or impediment." The section, therefore, targets communication which renders the commission of the offences easier to accomplish.* ***The harm sought to be avoided by the offence is that of***

---

[89] See R. v. Folino, supra, para. 25, RA, **Tab 21**; R. v. Dhankhukia, [2007] O.J. No. 592 (SCJ), para. 12, AA, Tab 4; R. v. Randall, [2006] N.S.J. No. 180 (PC), para. 18-21, AA, Tab 15

[90] [2009] O.J. No. 1682 (SCJ), para. 77, AA, Tab 14

[91] *House of Commons Debate,* No. 054 (03 May 2001) at 1620 (Hon. Anne McLellan) online: http://www2.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=54&Language=E&Mode=1&Parl=37&Ses=1#LINK233, p. 107-08, RA, **Tab 64**

[92] [2004] O.J. No. 1389 (CJ), para. 18-19, AA, Tab 10

> ***communication which renders children at risk to the offences listed.*** *The Crown need not establish that the offender would have committed one of the offences listed. Parliament did not intend to impose the burden of establishing beyond a reasonable doubt the future commission of an offence. That is simply impossible. The commission of the enumerated offences are punishable in and of themselves.* [emphasis added]

62. To date, Canadian courts, apart from the trial decision below, have rejected a narrow interpretation of the section which would expose vulnerable children to the risk of harm. This Court should not reverse that clear trend.

### *(c) The External Elements of the Offence*

### *(i) Introduction*

63. Context in this case is important. At the Court of Appeal level the Crown (then Appellant) advanced four grounds – two each in relation to the s. 152 and s. 172.1 offences. The Court of Appeal determined that the trial judge had erred in relation to each offence. The errors in relation to the s. 152 charge necessarily affected the analysis under s. 172.1 as it was one of the enumerated offences. It necessarily distorted the legal and factual analysis in relation to s. 172.1.

64. The sole ground of appeal in this case is that the Court of Appeal erred in its determination of the *mens rea* component of a s. 172.1 offence. The Appellant offers differing explanations of that component. At para. 54 the Appellant suggests that the requisite intent is to lure, meaning to entice. At para. 57 it is suggested that *luring, facilitating, and grooming* are the same and; at para. 58-59, accepts the definition of *facilitating* that was adopted by the Court of Appeal. At para. 60-61 it becomes an ever present intent to bring about an opportunity to commit a sexual offence. At 62 and 64 it again equates *luring* with *facilitation.*

65. Despite that last equation, the Appellant spends several pages (para. 46-57) urging upon this Court that *luring* should be considered an essential element. Penultimately, the Appellant states (at para. 101) that the *mens rea* is: *"Instead, the section requires that the communications have a further purpose, which is to make it easier* [this is facilitation] *for the adult to commit a sexual offence should he later form that intent. The intent to facilitate, to lure, or, as it may be easily described, to groom,* [now merging the words] *is the intent which must be present at the time of the communication.*

66. At para. 68 of the Court of Appeal's decision,[93] it indicates that the *mens rea* question is whether it was done "*for the purpose of facilitating*" an enumerated offence. The difference between the Appellant's penultimate conclusion and the Court of Appeal decision appears elusive.

67. One must go back to the trial decision[94] to see what was at stake. The trial judge summarized the argument of the defence as being that the Crown must prove that the accused had the intention to lure the child for the purposes enumerated and, that if there was no intention to lure a child to a meeting, the offence was not made out. Hence, an intent to carry out the offence, with some physical proximity, if the opportunity arose, was the defence *mantra*.

68. This connotative interpretation of *luring* runs throughout the trial level decision. The Crown's appeal was predicated on error of law both with respect to the *actus reus* and *mens rea*. The Court of Appeal concluded that the trial judge had indeed erred in both respects. Notably, this appeal does not challenge the Court of Appeal's legal conclusion with respect to the *actus reus*. However, **both** elements involve a legal determination as to what interpretation is to be placed on the words *facilitating an offence*. The unchallenged determination as to what constitutes the *actus reus* cannot, and should not, be undermined by introducing more restrictive elements into the *mens rea* component.

***(ii) Elements***

69. S. 172.1 contains a layering of protection for children, the protection broader as the age of the child decreases. It reads as follows:

> ***172.1*** *(1) Every person commits an offence who,* ***by means of a computer system*** *within the meaning of subsection 342.1(2),* ***communicates with***
>
> *(a)* ***a person*** *who is, or who the accused believes is,* ***under the age of eighteen*** *years,* ***for the purpose of facilitating*** *the commission of an offence under subsection 153(1)[sexual exploitation], section 155 [incest] or 163.1 [child pornography], subsection 212(1) or (4) [procuring] or section 271, 272 or 273 [sexual assault, sexual assault with a weapon, aggravated sexual assault] with respect to that person;*
>
> *(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[sexual*

[93] JR, Tab 4, para. 68
[94] JR, Tab 2, at para. 7-8

> *interference] or 152 [invitation to sexual touching], subsection 160(3)[bestiality] or 173(2) [indecent acts] or section 280 [abduction] with respect to that person; or*
>
> *(c) a person who is, or who the accused believes is, under the **age of 14** years, for the **purpose of facilitating** the commission of an offence under section 281[abduction] with respect to that person. [emphasis added]*

70. The elements of the offence determined by the Alberta and Ontario Court of Appeal are: (1) communication by means of a computer, (2) with a person under the proscribed age; (3) for the purpose of facilitating a designated offence. The Ont. CA held that the third element is the mental element or *mens rea* component; the first two, are the external elements or *actus reus*.[95]

71. A key division between the trial and appellate court below was the determination of what constitutes the *actus reus* of a s. 172.1 offence. In dealing with the *actus reus*, the trial court merged the physical and mental elements by requiring that an intention to lure be manifested in the language utilized by the accused. This is a subjective test. In stark contrast, the Court of Appeal directed that the words are to be examined contextually and objectively to determine whether they are reasonably capable of supporting an inference that the language is capable of facilitating a designated offence. In so doing, the Court of Appeal aligned itself with authority from this Court and other appellate decisions.

72. The logical nexus between the act of communicating and the purpose is that the communication must be objectively capable of achieving the purpose of facilitating. The concept of an objective standard being used to determine whether the external circumstances of the offence are met is consistent with authority from this Court, and other authority, dealing with "communication" type crimes.[96] Whether or not the advance is rejected or not accepted, or the recipient pretends to assent but does not intend to follow through, is irrelevant.[97]

73. Similarly, this Court, in *R. v. Sharpe*, clearly determined that the test for the external circumstances of a s. 163.1 offence (child pornography) is to be measured objectively:[98]

---

[95] R. v. Alicandro, supra, AA, Tab 3, para. 28-31; see also R. v. Pengelley, supra, AA, Tab 14, para. 85
[96] R. v. Hamilton, supra, AA, Tab 9, at paras. 15, 34, 37; Mugesera v. Canada, [2005] 2 S.C.R. 100, para. 63-64, (SCC), RA, **Tab 7**
[97] R. v. Glubiz (No. 2) (1979), 47 C.C.C. (2d) 232 (BCCA), at paras. 9-13; RA, **Tab 25**; R. v. Gonzague (1983), 4 C.C.C. (3d) 505 (Ont. CA), at paras. 9-12, RA, **Tab 26**
[98] Supra, RA, **Tab 50**, at paras. 43, 49-50, 55-56

*43 The first and second interpretations are inconsistent with Parliament's objective of preventing harm to children through sexual abuse.* ***The danger associated with the representation does not depend on what was in the mind of the maker or the possessor, but in the capacity of the representation to be used for purposes like seduction.*** *It* ***is the meaning which is conveyed by the material which is critical, not necessarily the meaning that the author intended to convey.*** *Moreover, it would be virtually impossible to prove what was in the mind of the producer or possessor. On the second alternative, the same material could be child pornography in the possession of one person and innocent material in the hands of another. Yet the statute makes it an offence for anyone to possess such material, not just those who see it as depicting children. The only workable approach is to read "depicted" in the sense of what would be conveyed to a reasonable observer. The test must be objective, based on the depiction rather than what was in the mind of the author or possessor. The question is this: would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity?*

.....

*55 This section is more limited than the definition of visual pornography in s. 163.1(1)(a), which captures sexual "representation[s]" of children. Section 163.1(1)(b) is confined to material relating to activity that would be a crime under the Criminal Code. Moreover, it is confined to material that "counsels" or "advocates" such crimes. On its face, it appears to be aimed at combating written and visual material that actively promotes the commission of sexual offences with children.*

- *At stake is not whether the maker or possessor of the material intended to advocate or counsel the crime, but whether the material,* ***viewed objectively,*** *advocates or counsels the crime. "Advocate" is not defined in the Criminal Code. "Counsel" is dealt with only in connection with the counseling of an offence: s. 22 of the Criminal Code, where it is stated to include "procure, solicit or incite". "Counsel" can mean simply to advise; however in criminal law it has been given the stronger meaning of actively inducing: see R. v. Dionne (1987), 38 C.C.C. (3d) 171 (N.B.C.A.), at p. 180, per Ayles J.A. While s. 22 refers to a person's actions and s. 163.1(1)(b) refers to material, it seems reasonable to conclude that in order to meet the requirement of "advocates" or "counsels", the material,* ***viewed objectively,*** *must be seen as "actively inducing" or encouraging the described offences with children. Again, Parliament's purpose of capturing material causing a reasoned risk of harm to children may offer guidance. The mere description of the criminal act is not caught. Rather, the prohibition is against material that, viewed objectively, sends the message that sex with children can and should be pursued.*

74. By asking the question, "what would a reasonable observer perceive?" and by defining counseling as being capable of actively inducing, the risk of capturing the morally innocent was sharply reduced.[99] The same approach is applicable to a charge under s. 172.1.

75. It accords with the broad purpose and intent of the legislation; is consistent with communication crimes involving children, and can be properly placed within the scheme of secondary offences that provide protection to children. For example, if we look at s. 152, the offence is:

> ***152.*** *Every person who, for a sexual purpose,* ***invites, counsels or incites*** *a person under the age of 16 years to touch,* ***directly or indirectly****, with a part of the body* ***or with an object, the body of any person****, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years,*
>
> *(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days; or*
>
> *(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days. [emphasis added]*

76. To "*incite*" touching for a sexual purpose, it must be proven that the offender, by some positive act, urged, persuaded or encouraged the person under the age of fourteen years to do so, with respect to ***any person***. It may be in relation to the child, the accused or another person. It may contemplate an act to be performed directly or indirectly, and by an object, rather than direct physical contact.

77. Counseling, and incitement also include indirect invitations as illustrated in *R. v. D. (H.)*.[100] The accused was convicted under s. 153(b) when he went into the bedroom of his 14-year-old stepdaughter in his underwear and asked her three times, "*Are you horny*?" He sat on the side of her bed and said, "*It can be our little secret, nobody needs to know.*" Although there was no actual touching, nor (as the trial judge concluded) an express invitation to do so, the

---

[99] *Ibid*, at paras. 43, 55
[100] (1990), 112 N.B.R. (2d) 91 (Q.B.), RA, **Tab 20**

reviewing Justice concluded that s. 152 required neither. S. 152 is to be given a broad interpretation to capture such situations.[101]

78. The term "*counsels*" is given a non-exhaustive definition in s. 22(3) C.C.[102] and includes procure, solicit or incite. Counseling has been authoritatively defined by the majority decision of this Court in *Hamilton*:[103]

> *"...the actus reus for counselling is the deliberate encouragement or active inducement of the commission of a criminal offence. And the mens rea consists in nothing less than an accompanying intent* ***or*** *conscious disregard of the substantial and unjustified risk inherent in the counselling: that is, it must be shown that the accused either intended that the offence counselled be committed,* ***or knowingly counselled*** *the commission of the offence while aware of the* ***unjustified risk*** *that the offence counselled was in fact likely to be committed as a result of the accused's conduct." [emphasis added]*

79. The actus reus for a s. 152 offence is the invitation to touch, or counseling to touch, or inciting to touch, directly or indirectly, the body of any person for a sexual purpose. Flowing from the purposive approach to interpretation of statutes, clearly intended to protect children, actual physical contact for a sexual purpose is not an essential element. A conviction may be entered under s. 152 where there was an invitation to touch, counseling to touch, or the incitement to touch, without the necessity of any actual touching.

80. In *Rhynes*, the P.E.I. Court of Appeal recognized that the previous state of the law was unsatisfactory, previously requiring acts that were tantamount to an actual assault. Using a purposive approach, the Court determined that s. 152 was intended by Parliament to capture intended sexual interaction of any kind, between an adult and child, even if initiated by the child:[104]

> *8 Prior to the enactment of these sections any sexual conduct by an adult toward a child had to be tantamount to an assault before it was an offence. Each of the three offences is intended to provide for different situations and together they demonstrate the extent to which Parliament was prepared to go in protecting children. However, as with any criminal offence, the purpose of which is to protect members of society from the wrongful conduct of others, each has essential elements which must be proven beyond a reasonable doubt before a person accused of committing one of the offences can be convicted.*

---

[101] Ibid., at paras. 2, 16-19
[102] Reproduced at RA, **Tab 78**
[103] R. v. Hamilton, supra, AA, Tab 9, at para. 29
[104] R. v. Rhynes, supra, para. 8-10, and see also 14, RA, **Tab 45**

> *9 For example, to sustain a conviction under s.151 it must be proven the child was touched for a sexual purpose. Giving a purposive interpretation to the section, courts have held that contact with the body of the child by any part of the body of the accused constitutes the offence so that even if the child initiated the contact, the accused could still be convicted. In R. v. Sears (1990), 58 C.C.C. (3d) 62 (Man. C.A.) Helper J.A. stated at p. 63:*
>
> > *In reading this section as a whole, it is clear that an accused who intends sexual interaction of any kind with a child and with that intent makes contact with the body of a child "touches" the child and (sic) is guilty of an offence. The section addresses not the instigator of the sexual conduct but rather the adult who for his or her own sexual purposes makes contact,* ***whether as a primary actor or not****, with the body of a child. (My emphasis)*
>
> *10 On the other hand, it is not an essential element of the offence constituted by s. 152 that contact for a sexual purpose be proven. A conviction may be entered under this section where there was an invitation to touch, counselling to touch or the incitement to touch, yet there was never any touching. See: R. v. Fong (1994), 92 C.C.C. (3d) 171 (Alta. C.A.). For example, if an accused invites, counsels or incites sexual contact and the child runs away, a conviction could still be sustained. This broadens the scope of the protection for children far beyond the situation where there is actual touching.*

81. Remembering that the addition of s. 172.1 was stated to provide additional protection for children, it must occupy a position that is different than the secondary offences (such as s. 152 above) or an attempt of the same crime. As expressed in *R. v. Brown*:[105]

> *The harm sought to be avoided by the offence is that of communication, which renders children at risk to the offences, listed. The Crown need not establish that the offender would have committed one of the offences listed. Parliament did not intend to impose the burden of establishing beyond a reasonable doubt the future commission of an offence; that is simply impossible. The commission of the enumerated offences are punishable in and of themselves.*

82. What Parliament has created is, as expressed in *Alicandro*,[106] an inchoate crime that captures the precursor conduct – the communication:

> *19 Before examining the specific language of s. 172.1(1)(c), it is helpful to consider s. 172.1 on a more general level.* ***The crimes created by that section target a specific kind of conduct, the communication*** *by means of a computer with a person who is, or is believed to be, below a certain age. That conduct is not in and of itself criminal, illegal, or necessarily inappropriate.* ***The section criminalizes that conduct only if it is accompanied by the intention to facilitate***

---

[105] Supra, RA, **Tab 13**, para. 107-08
[106] Supra, AA, Tab 3, para. 19-21

> *the commission of one of the crimes designated in s. 172.1. All those designated crimes are crimes against young persons and all potentially involve the sexual exploitation of young people.*
>
> *20 By* ***criminalizing conduct that is preparatory*** *to the commission of the designated offences,* ***Parliament has sought to protect the potential child victims of those designated crimes by allowing the criminal law to intervene before the actual harm caused by the commission, or even the attempted commission****, of one of the designated offences occurs. Section 172.1 creates what Professor Ashworth refers to as essentially inchoate crimes, described in substantive offence terms: Andrew Ashworth, Principles of Criminal Law, 5th ed. (Oxford: Oxford University Press, 2006), at pp. 468-470.[FN3]*

***(iii) Facilitation***

83. The bridge between the *actus reus* and *mens rea* for s. 172.1 centres around the word "*facilitating*". If it must be objectively capable of facilitation for the *actus reus*; then the subjective purpose to facilitate must established – at least as per the plain language of the section itself.

84. As indicated above the official version of the Bill (supra, para. 57-58) has the words "*luring a child*" as a marginal note. The word "*luring*" appears no where in the offence section itself, either in the English or French version of the provision. As Sullivan and Driedger summarize,[107] a statute's headings or titles may be used to assist in **resolving ambiguity** (though not determinative); but it is well established that marginal notes do not form part of the legislation. While a Court may consider them, the case for their utilization as an aid is much weaker than titles or headings,[108] and may be viewed as unhelpful or misleading.[109]

85. The English version refers to "*for the purpose of facilitating*"; the French version uses the words "*en vue de faciliter la perpetration...*". In the courts below, the trial court fixed on the word "*luring*" whereas the Court of Appeal fixed on the plain, direct language of the section which speaks of *facilitating*. The Court of Appeal stated, at para. 58:

> *"Facilitating" must mean something else. The etymology of "facilitating" includes the French "faciliter" drawn from the Latin "facilis" which means "easy" which means to make something easier to do: see, e.g. Black's Law Dictionary, (R) Seventh Edition, (West Group, St. Paul, Minn., 1999). In the context of this provision, facilitating is to make easier the ability to commit one of the listed offences.*

---

[107] Sullivan and Driedger on the Construction of Statutes (4th edition) (2002), supra, RA, **Tab 72**, at pp. 305-311
[108] R. v. Wigglesworth, [1987] 2 S.C.R. 541, AA, Tab 18, at para. 28
[109] Sullivan and Driedger, supra, RA, **Tab 72**, at p. 311 and cases cited at footnote 133

86. That definition accords with the interpretation given by other, numerous Canadian courts, as summarized in *Pengelley*, which exhaustively reviews numerous decisions that have interpreted the word *facilitating*, in a similarly broad fashion.[110] As *Pengelley* sets out the interpretations in detail, the cases cited will not be duplicated here. After reviewing both Canadian and UK authority, the court concluded that the definition must be broad:[111]

> *98 In summary, facilitating within the proscription of s. 172.1(1)(c) includes preparatory conduct in the form of communications linked to promoting, advancing, laying a foundation, making easier, helping or removing impediments toward the commission of an act of sexual exploitation such as the conduct prohibited by s. 151. Because the s. 172.1(1)(c) offence is directed at a reasoned risk of harm preceding more proximate danger to a child, arrangements or suggestions of a meeting are not matters essential to proof of facilitating.*

87. Similarly, in *R. v. Randall*[112] a provincial court judge did not accept the view expressed by the trial judge in *Legare* that communication is insufficient. In *Randall*, the trial judge was of the view that Parliament's fundamental intention was to protect children from persons who use the Internet to target and where the potential for victimization could become a reality. Accordingly, he adopted the definition of "*facilitate*" from Black's Law Dictionary[113] as meaning to make the commission of a crime easier.[114]

88. This is not a case of ambiguity for which resort must be had to the marginal note. It is critical to note that it was in *Sharpe*, that the concepts of *facilitating* and *grooming* were first discussed and introduced into Canadian law:[115]

> *This brings us to the countervailing interest at stake in this appeal: society's interest in protecting children from the evils associated with the possession of child pornography. Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may* ***facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences****. Some of these links are*

---

[110] Supra, AA, Tab 14, para. 96-97
[111] Ibid., para. 98
[112] supra, AA, Tab 15, para. 18
[113] Reproduced at RA, **Tab 56**
[114] R. v. Randall, supra, AA, Tab 15, at para. 16
[115] Ibid., at para. 28

> *disputed and must be considered in greater detail in the course of the s. 1 justification analysis. The point at this stage is simply to describe the concerns that, according to the government, justify limiting free expression by banning the possession of child pornography.[emphasis added]*

89. It is of importance to note that this Court recognized the critical difference between an act that might facilitate seduction and grooming; as against what **might** flow from that act. The risk that children are to be protected from is the grooming, which may break down inhibitions or incite future offences. The Court accepted that the mere possession (as opposed to manufacturing or distributing) child pornography, has a correlation with four **possible** dangers that might or might not actually occur in any given individual circumstance: (a) it promotes cognitive distortions; (b) it fuels fantasies, (c) it is important to prevent actual harm and (d) in some cases, real children might be involved.[116] The same potential dangers apply to online sexual exploitation by adults against children.

90. To summarize, and place s. 172.1(1)(c) in concrete terms, the Crown's submission is that the external circumstances of the offence are:

1. A person
2. **By means of a computer** – the plain meaning is that the offence is committed by the computer communication itself and no physical meeting is required – to hold otherwise is to vitiate the plain words of the section
3. Communicates with a child under the age of 14
4. In a manner that, objectively viewed, facilitates (makes easier) the potential commission of a designated offence, neither of which requires direct physical contact.
5. It is the act of facilitating or grooming which is the gravamen of the offence as described by the Supreme Court.

### *(d) The Mental Element*

91. The trial decision below introduces what was described as a "*subtle*" distinction between an intent to commit the offences and an intent "*to lure*" for that purpose. That adds in words not

---

[116] R. v. Sharpe, supra, RA, **Tab 50**, at paras. 88-94

present in s. 172.1. In *Regina v. Rosen*[117] McIntyre J. set aside an interpretation which would "...introduce unnecessary words into the section which are not required to clarify any ambiguity." As the noted author, Pierre André Côté, points out in his text on statutory interpretation, "*...it must also be assumed that each term, each sentence and each paragraph have been deliberately drafted with a specific result in mind. Parliament chooses its words carefully: it does not speak gratuitously.*"[118] Similarly, as stated in *Thompson v. Goold*: *It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.*[119] The section does not read "with intent to commit an offence pursuant to s. 151 or s. 152".

92. The trial judgment below never focused on the meaning of legal intention. Instead, it focused on something called the "*intent to lure*" which creates four problems. **First**, luring, as previously noted, does not actually form part of the legislation in question.

93. **Secondly**, according to the judgment, assessment of intention of the requisite degree of subjective foresight, is not be assessed contextually but, rather, according to what is in the back of the mind of the accused. This falls into the error of confusing intent and motive, something that the Supreme Court has expounded upon at length in *R. v. DeSousa*,[120] *R. v. Hibbert*,[121] and more recently confirmed in *Hamilton*.[122]

94. While the Appellant (Appellant's factum, para. 83) seems to rely on a paper by Fitch,[123] for the proposition that he preferred the trial judge's interpretation of s. 172.1 it should be noted that the paper was written **before** the Court of Appeal released its decision. Indeed, the author states quite directly that the pending judgment of the Court of Appeal might provide necessary guidance. The author also expressly eschews the notion that an intent to commit a designated offence must be proven as such would be impossible, without eviscerating the remedial function of the legislation.

---

[117] [1980] 1 S.C.R. 961 at 974, RA, **Tab 48**
[118] Cote, P., *The Interpretation of Legislation in Canada* (Quebec: Yvon Blais, 1984) at 210, RA, **Tab 59**
[119] *Thompson v. Goold & Co.*, [1910] A.C. 409 at 420 per Lord Mersey, RA, **Tab 52**
[120] [1992] 2 S.C.R. 944, 1992 CarswellOnt 100, RA, **Tab 18**, at para. 32, 38
[121] [1995] 2 S.C.R. 973, RA, **Tab 30**, at paras. 28-29; 37-45
[122] Supra, AA, Tab 9, para. 41-45
[123] AA, Tab 1, pp. 15, 17

95. This is a vital point in relation to properly interpreting the section. The Appellant posits that the purpose portion is most clearly indicated where there is intended physical contact (see Appellant's factum, para. 65). That may be of some comfort where there is an undercover operation but not where a child is involved. There have been far too many cases where physical meetings have occurred with devastating consequences. How it would be different than the crime of attempt would be more than elusive – it would be distinction without a difference.

96. The **third** problem is that the interpretation offered by the trial judge ignores that the offence is specifically stated to be by way of computer communication. Even in American jurisdictions where the crime of attempt is utilized, it is recognized that an attempt to commit the substantive offence, and an attempt to solicit are very different. The Court of Appeal of Virginia,[124] dealing with internet solicitation, coped with the argument that there must be intent for the minor to act upon the solicitation. In holding that criminal solicitation involves the attempt to incite the court held that it is immaterial whether the solicitation has any effect as the "*gist of the offence is incitement*". It was further held that the fact that the accused and a child are located in different cities is of no consequence for the "*...separate crime of solicitation may be completed before an attempt is made to commit the solicited crime*".

97. In the trial judgment below,[125] para. 13 suggests that the "*grooming*" process needs to demonstrate a desire for a physical meeting, but then states that may not always be the case (para. 14). However, the trial judge was of the view that the evidence did not establish that the Respondent was "*grooming*" or "*luring*" because the intent would only be to "*talk dirty*" as opposed to "*intend to meet*" (para. 15). In contrast, the New Jersey Superior Court, dealing with a perpetrator who had called 11 different girls by telephone, held that his engagement of the girls in conversations with them regarding their private parts, and/or oral sex and/or his desire to perform sexual acts upon them and/or his desire to have them perform sexual acts upon him clearly established probable cause for the commission of endangering the welfare of a child.[126]

98. The trial level ambiguity continued in discussing the mental element to the crime, the trial judge concurring with the defence that, while there need not be an intent to carry out the offence, but there had to be an intention to *lure* a child for that purpose (paras. 17-18). The trial

---

[124] Brooker v. Commonwealth, 587 S.E.2d 732 (CA), para. 1, 7, and cases cited therein, RA, **Tab 3**
[125] JR, Vol. I, Tab 2

judge's meaning of the word "*lure*" is never defined but simply repeated, at paras. 21-22, as an essential component. Therefore, according to the judgment, there must be an intent to "*lure*" with the offender having it in mind that he may attempt to commit the offence after the opportunity presents itself.

99. Therefore, the **fourth problem** is, that by defining "*luring*" as requiring an indication of a desire to meet, the trial judge equated s. 172.1 with the crime of attempt which requires specific intent to carry out the offence demonstrated through a substantial step taken in furtherance of that intention, for which inducing or persuasion may be insufficient.[127] Indeed, the trial judge would seem to require that the online "*grooming*" be at that stage, which is actually the old form of attempt, which required that the acts be at the penultimate step before the crime of attempt was completed.[128] The meaning attached to the word "*luring*" by the trial judge defeated the purpose of s. 172.1 as remedial legislation.

100. Nor is it an answer to say, as the Appellant does, (see Appellant's factum, para. 78) that the section does not intend to capture adult perpetrators who merely seek to *entertain* themselves. No doubt *Innes, supra* was entertaining himself by inducing young girls to perform sexually over the computer; and others who like to induce mastubatory acts; or obtain articles of clothing to masturbate themselves; or obtain nude or sexually explicit material; or make young children receptive to receiving the same; or obtain, and transmit such material. At what point does the risk taking with the personal integrity of young children stop? The last thing the provision needs is the introduction of an ambiguous test of "beyond entertainment".

101. The Court of Appeal correctly concluded[129] that the legislation is aimed at predatory conduct that would not otherwise qualify as an attempt. Requiring the taking of steps that could bring about an actual meeting would arguably be beyond mere preparation and hence caught by the crime of attempt.[130] The Court further reasoned that given the potential consequences for a child at a meeting, the legislation must have intended to minimize that possibility; but must also

---

[126] New Jersey v. Maxwell, 825 A.2d 1224 (SC), para. 12, RA, **Tab 8**
[127] See R. v. Ancio [1984] 1 S.C.R. 225 (SCC), at p. 250-51, RA, **Tab 10**; U.S. v. Dynar, [1997] 2 S.C.R. 462, at paras. 37, 50, 59-68, RA, **Tab 53**; R. v. Deutsch (1986), 27 C.C.C. (3d) 385 (SCC), RA, **Tab 19**, at paras. 25-29
[128] Meehan, The Law of Criminal Attempt (1984), at pp. 103-108, RA, **Tab 66**; and discussed in R. v. Deutsch, ibid., at paras, 31-34
[129] JR, Vol. I, Tab 2, para. 59-63
[130] See U.S. v. Dynar, supra, RA, **Tab 53**, para. 50; and R. v. Deutsch, supra, RA, **Tab 19**, para. 26-34

have been aware of the borderless nature of the Internet, and the phenomenon of predators obtaining and sharing child pornography. Parliament would be aware that predators seek to create a climate of acceptance for such abuse. The Court observed that an accused may target many children, cognizant that some contacts may be unavailing.

102. The Court of Appeal decision accords with the literature and cases cited above. The focus of the legislation is on the communication precisely to minimize the diverse risks to children. It is not that the designated offence has been committed, but rather, the communication prohibition, pursuant to s. 172.1, is the precursor action that triggers the offence. If it is a requirement that the s. 151 or s. 152 offence be completed, then s. 172.1 would be mere surplusage. If it is interpreted as requiring proof of intent (now or in the future) to commit the secondary offences, then s. 172.1 would again be surplusage as that situation would be caught by the crime of attempt.

103. It may be that a perpetrator may have an end object or desire in mind which is known only to him; but that is not to be confused with conduct that, as per *Sharpe, supra,* involves the purposeful breaking down of inhibitions which may have the consequence of inducing further acts by a child. The gravamen of the offence is computer communication with an underage minor that is capable of rendering a child more susceptible to other offences.

104. The morally innocent are screened out using the objective, contextual test for the *actus reus* – communication that has the capability of facilitating by breaking down inhibitions. The moral culpability is supplied through the *mens rea* component – subjectively and purposely doing something for the purpose of breaking down the inhibitions of the child or rendering them more susceptible to future contact, demands or requests. The Court of Appeal was quite correct in stating that a perpetrator may make contact with numerous children before finding one that can be rendered susceptible. The focus must remain on the communication and not what is concealed in the back of the perpetrator's mind.

105. It is in that sense that the Crown below argued that this line of reasoning defeats the obvious remedial purpose of the legislation to protect children from online sexual exploitation. The question is not whether he intended to meet or intended to commit the offence. The critical questions are, **viewed contextually**, did the accused:

1. Communicate by computer with an underage child;
2. In a manner objectively capable of facilitating (making easier) an offence; the risk being that a child (presumptively vulnerable) may at some time succumb to invitations or directions for other offences; with physical contact not required.
3. For the purpose of facilitating, meaning with the intent or subjective foresight as to the substantial risk that a child's inhibitions may be lowered or may succumb to involvement in sexual offences.

### *(e) Application to Case*

106. Simply to say, as the Appellant does (Appellant's factum, para. 103), that where a trial judge has a doubt there must be an acquittal, does not address the real issue. A conclusion as to doubt, if the evidence is considered through the wrong legal tests, is not a sustainable verdict.

107. As previously indicated it appears that the Appellant is now accepting that s. 152 (a designated offence and one designated in this case) does not require proof that the accused intended words to be taken seriously. However, that was the erroneous starting point for the trial judge's analysis, distorting the legal prism at the outset.

108. Coupled with the errors in relation to both the physical and mental elements of both s. 152 and 172.1, the trial judge's analysis went seriously awry. The trial judge never considered the possibility of invitation, counseling or inciting respecting an accused touching the child for a sexual purpose. A request by an accused to permit him to touch private parts has been held to be an invitation for a sexual purpose; the Ontario Court of Appeal correctly concluding that both situations – invitation to touch the child, or invitation to touch the accused – are caught.[131] Whether that is to be done through direct physical contact or not is immaterial – both are caught by the section.

109. The Trial Judge had to review the entire context of the communications starting, we suggest, with the clear lying about age making it appear that the child was speaking to a youth (age 17). If an older person approaches someone in a playground the child at least has the

---

[131] R. v. Gray, supra, RA, **Tab 27**, at para. 7

potential for running away. The anonymity, and invisibility of online exploitation contributes to obtaining the confidence of the child.

110. The first sexually explicit conversation established a willingness to talk sexually. The second, and that recorded in the chat log, is dominated not by sexual talk but by obtaining personal information making future direct contact possible and; directing the conversation to obtainment of panties and pictures, expressly stated as being for the intention of masturbation. It was the primary focus of that hour of online chat. Again, there was no consideration by the trial judge as to whether there was an invitation to indirectly touch with an object (panties) for a sexual purpose. In this case, the accused had a motive of sexual gratification through the use of the panties belonging to the complainant.

111. It was repeatedly emphasized that he was serious and wanted the child to be serious about it, with clear direction that he would be following up by phone. Immediately upon completion of the online chat, the conduct is escalated - the phone calls start. The entire conversation is directed at arousing sexuality and acts of sexual gratification, and the pursuit and strengthening of some form of "relationship".

112. The Appellant was persistent in his request for her panties, calling her to remind her to send them, told her he wanted her to wear them for a day or two, and said he would use them to stroke himself and 'show her' on the computer. He gave a "*promise*" the he would buy her new panties if she did this for him." From this it is clear that the complainant's involvement with the clothing was an essential component so far as the accused was concerned. It was not about the clothing itself, but about the fact that it was worn by a child, as an aid to masturbation. His stated intention was clear that he intended to use them for that very purpose, and to exhibit himself doing so to the child. This was to be bolstered by obtaining pictures of the girl, the obtainment of her phone number, and invitation for web cam communication. It seems hard to fathom how this did not place the child within the zone of considerable risk.

113. In return, it was intended that the child should also receive his boxer shorts. A trial court, properly applying the law, could well infer the intention for continued sexual activity with the child to mirror the Appellant's behavior with his shorts, given his repeated requests for confirmation that the child was aroused.

114. It is to be remembered that much of the conversation was directed to ensuring he was dealing with a young girl (hence, asking about pubic hair, periods, first time sexual experience) which only heightened his arousal. When he engaged the young girl in this, it is evident that he was pressing toward immediate sexual gratification and future gratification once the panties were received. His online chat, his obtainment of her phone number, and phone calls followed up on his stated intention and promise to press that upon the child.

115. When the context and chat log are properly considered, it is clearly directed toward establishing a relationship of trust with the girl and the seductive sexualization of the girl. That constitutes the facilitation aspect of the offence, which by its plain terms can be completed by computer. The Trial Judge seemed to think that something beyond the computer communication was required. Addressing legal intention correctly and not being diverted by words that are not present in the legislation must lead to the conclusion that this was facilitation. This offender clearly intended to follow-up and, in fact did so.

116. Fortunately, a parent was able to intervene at a timely stage and stop the communication. We must not place an interpretation on s. 172.1 that would require us, as a society, to await upon additional risk to a child. It is not simply that we would be failing in our international obligations, but that we would be utterly failing children. In this case, the Trial Judge's view as to what evidence was required would mean that a child must continue into the process of grooming until the risk of harm is ever greater, and an intention to meet is evinced. This is hardly protection from online sexual exploitation, and is a formulation that requires children to be placed at risk.

117. The interpretation of s. 172.1 goes to the very core of protection of young children and preventing their sexual exploitation. With respect, the trial judgment below falls far short of that universally accepted goal. The Crown Respondent urges that a broad, purposive interpretation is the correct approach and, that when properly interpreted, there is sufficient evidence of the offence to warrant a new trial, as ordered by the Court of Appeal.

## PART IV: SUBMISSION ON COSTS

118. This is a criminal case and costs are not being sought.

**PART V: NATURE OF RELIEF DESIRED**

119. IT IS RESPECTFULLY SUBMITTED that this appeal from an order for a new trial be allowed, the order set aside, and the convictions affirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11 th the day of June, 2009.

James C. Robb, Q.C.
Counsel for
The Attorney General of Alberta

## PART VI: TABLE OF AUTHORITIES

## PART VII ARTICLES AND ANNOTATIONS REFERRED TO

| | | Paragraph No. |
|---|---|---|
| 55 | Alexy, Burgess, and Baker, Internet Offenders: Traders, Travelers and Combination Trader-Travelers (2005), Jo. of Interpersonal Violence 804 | 37 |
| 56 | Black's Law Dictionary, definition of "facilitate" | 87 |
| 57 | Childnet International, Online Grooming and UK Law | 41 |
| 58 | Commentary to the Crimes Amendment Bill (No. 2) | 46 |
| 59 | Cote, P., The Interpretation of Legislation in Canada (Quebec: Yvon Blais, 1984) at 210 | 91 |
| 60 | Dombrowski, LeMasney, Ahia, Dickson, Protecting Children From Online Sexual Predators: Technological, Psychoeducational and Legal Considerations (2004), 35 Professional Psychology: Research and Practice 65 (online version) | 37, 40 |
| 61 | ECPAT International, Violence Against Children In Cyberspace (2005) prepared for the United Nations | 35, 36 |
| 62 | Environics Research Group, Young Canadians in a Wired World (2001) prepared for the Government of Canada | 38 |
| 63 | Finkelhor, Mitchell and Wolak, Online Victimization: A Report on the Nations Youth (2000), prepared for the U.S. Congress, pp. ix-x, 1-19 | 38 |
| 64 | *House of Commons Debate,* No. 054 (03 May 2001) at 1620 (Hon. Anne McLellan) online | 60 |
| 65 | Hughes, the Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children (2002), 13 Hastings Women's Law Jo. 127 | 35 |
| 66 | Meehan, The Law of Criminal Attempt (1984), at pp. 103-108 | 99 |
| 67 | Muncie, J., The Globalization of Crime Control – the case of youth and juvenile justice, in Theoretical Criminology (2005) | 30 |
| 68 | Nicolee Dixon, Catching Cyber Predators: the Sexual Offences Amendment Bill 2002 | 45 |

## PART VIII LEGISLATION

| | | |
|---|---|---|
| AF, Part VII, pp. 40 | s. 153 *Criminal Code of Canada* | 56, 77 |
| AF, Part VII, pp. 42-46 | s. 163.1 *Criminal Code of Canada* | 54, 73 |
| AF, Part VII, pp. 47-48 | s. 172.1 *Criminal Code of Canada* | 1, 2, 3, 14, 18, 19, 24, 32,53, 54, 55, 56, 60, 61, 63,64, 69,71, 74, 81, 83, 90, 91, 94, 99, 102, 108, 116, 117 |
| 80 | s. 172.1 *Criminal Law Amendment Act, 2001* | 58 |
| 81 | s. 12 *Interpretation Act* | 25 |