WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order.
>
> (2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim

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shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. D.N., 2023 ONCA 561
DATE: 20230825
DOCKET: C64937

2023 ONCA 561 (CanLII)

Simmons, Paciocco and Zarnett JJ.A.

BETWEEN

His Majesty the King

Respondent

and

D.N.

Appellant

Jeffery Couse, for the appellant

Emily Marrocco, for the respondent

Heard: February 9, 2023

On appeal from the convictions entered on September 12, 2016, and the sentence imposed on November 3, 2017, by Justice Bruce G. Thomas of the Superior Court of Justice.

Simmons J.A.:

A. INTRODUCTION

[1] In September 2016, following a judge-alone trial, the appellant was convicted of 53 internet-based offences including making, accessing, possessing, and distributing child pornography; making sexually explicit material available to a

child to facilitate commission of an offence; child luring; arranging a sexual offence against a child; uttering threats; and extortion.

[2] Subsequently, on November 3, 2017, the trial judge designated the appellant as a dangerous offender, sentenced him to a determinate sentence of 11 years' imprisonment less 60.5 months credit for presentence custody, and imposed a 10-year Long-Term Supervision Order (the "LTSO").

[3] The appellant appeals 20 of his 53 convictions and the length of the determinate sentence of imprisonment. He does not challenge the dangerous offender designation or the LTSO.

[4] The appellant's 53 convictions arise from internet chats[1] with over 20 internet chat partners. Only two of these chat partners testified at trial. However, the contents of all the chats were extracted from the appellant's electronic devices and the relevant chat logs were filed as exhibits at trial (the "chat evidence").

[5] The 20 convictions forming the subject matter of this appeal relate to 14 purported chat partners[2], none of whom were identified by the police.

[6] The appellant did not call evidence at trial.

[1] As will be explained, the term "chats" is used for convenience only.
[2] There was evidence potentially capable of supporting an inference that two of the chat partners may have been the same person.

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[7] Nineteen of the 20 convictions the appellant is appealing are for child exploitation offences contrary to three sections of the *Criminal Code*, R.S.C., 1985, c. C-46 (the "child exploitation provisions"):

- s. 171.1 (making sexually explicit material available to a child to facilitate commission of an offence) – the appellant appeals two convictions for this offence;
- s. 172.1 (child luring – communicating with a child by means of telecommunication, for the purpose of facilitating certain designated offences against that person) – the appellant appeals 15 convictions for this offence; and
- s. 172.2 (arranging a sexual offence against a child) – the appellant appeals two convictions for this offence.

[8] The child exploitation provisions all require that the Crown prove, as an element of the offence, either that the alleged victim was under a specified age (18, 16 or 14 years of age, depending on the relevant subsection) when the offence was committed or that the accused believed that the alleged victim was under the specified age.

[9] The child exploitation provisions also each contain an identical presumption provision (the "Presumption" or the "Presumptions" or the "Presumption provisions"), which provides that "[e]vidence that [the alleged victim] was

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represented to the accused as being under [the specified age], is, in the absence of evidence to the contrary, proof that the accused believed that [the alleged victim] was under that age."

[10] Finally, the child exploitation provisions also each contain a "no defence" subsection that states it is not a defence that the accused believed that the alleged victim was at least the specified age "unless the accused took reasonable steps to ascertain the age of the person."

[11] Following the appellant's conviction and sentencing, the Supreme Court of Canada declared the Presumption in s. 172.1(3) of the *Criminal Code*, relating to child luring, unconstitutional: *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R 3.

[12] The appellant relies on that declaration and also seeks declarations for the first time on appeal that the identically worded Presumptions contained in ss. 171.1(3) and 172.2(3) are unconstitutional.

[13] In the unique circumstances of this case, the Crown is not opposed to the appellant raising these constitutional issues for the first time on appeal and to this court holding ss. 171.1(3) and 172.2(3) unconstitutional.

[14] However, the Crown submits that the trial judge did not rely on the Presumptions to find that the appellant believed, or was wilfully blind to the fact,

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that the alleged victims of the 19 child exploitation offences forming the subject matter of this appeal were underage[3].

[15] Rather, says the Crown, the trial judge relied on the large body of circumstantial evidence found in the chat evidence to conclude that, with respect to each count alleging a child exploitation offence in relation to an alleged victim who did not testify, the only reasonable inference was that the appellant believed that the alleged victims were underage. In the alternative, if the trial judge did rely on the Presumptions, the Crown submits this court should rely on the proviso contained in s. 686(1)(b)(iii) of the *Criminal Code* to uphold the convictions.

[16] The appellant concedes that the proviso would be available with respect to one of the 19 child exploitation offence convictions forming the subject matter of the appeal (count 38 – child luring to facilitate a child pornography offence), because the chat evidence indicates the appellant and the chat partner in relation to this count were using live video.

[17] The remaining conviction that the appellant challenges is a conviction for invitation to sexual touching contrary to s. 152 of the *Criminal Code* (count 60). The Crown concedes that it did not offer proof that the alleged victim was under

[3] The Crown acknowledges that, in relation to the child exploitation provisions, where the identity of the alleged victim is unknown, the Crown must prove beyond a reasonable doubt as an element of the offence that the accused believed that the alleged victim was under the specified age. This requirement can be met in one of two ways – by proving actual belief in age, or by establishing willful blindness. Recklessness as to age will not suffice.

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the age of 16 years as required under that section. However, the Crown submits that, based on the evidence adduced at trial, this court should substitute a conviction for attempted invitation to sexual touching.

[18] Concerning his sentence appeal, the appellant submits that, whether his conviction appeal is allowed, the determinate period of imprisonment imposed as part of his sentence should be varied to time served. He also submits that the concurrent determinate sentences of 11 years imprisonment imposed in relation to four of his convictions (counts 1, 20, 85 and 12) are illegal as they exceed the maximum permissible sentence under the *Criminal Code*.

[19] For the reasons that follow, I would allow the appellant's conviction appeal, and dismiss his sentence appeal, save for varying any illegal sentences to a legal sentence. As I will explain, I would not accept the appellant's concession concerning count 38.

B. BACKGROUND

[20] In June 2014, a computer technician contacted the police after seeing child pornography on a computer he was repairing for the appellant.

[21] The police obtained warrants to search the appellant's home and electronic devices. They found numerous child pornography videos and images on the appellant's electronic devices – 41 videos (32 of which were unique), and 1726 child pornography images (397 of which were unique) – together with evidence of

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the appellant making sexually explicit material available to apparently underage individuals and frequently accessing teen dating sites.

[22] In addition, the police found evidence of chats between the appellant and numerous chat partners scattered around the world. Examination of the chats revealed that many of the chat partners represented themselves as being underage and that the content of the chats was explicitly sexual.

[23] I use the term “chats” for convenience only. Some of the chats were not necessarily text message exchanges or limited to text message exchanges. Rather, some involved audio and video calls, text and video messaging, conference calls, and file transmissions. In some of the chats, the appellant invited the chat partners to engage in sexual touching of themselves or others. He often sought explicitly sexual photographs of the chat partners or others with whom they were associated and exchanged photographs that were admittedly pornographic. In many of the chats, the appellant threatened the chat partners that he would expose their behaviour if they did not comply with his demands for photographs, either by posting photographs online, contacting a parent or making other threats that would resonate with children/young teenagers.

[24] Ultimately, the appellant was charged with committing 89 offences between January 1, 2013 and June 3, 2014. The charges referred to more than 20 chat partners, most of whom were identified in the indictment by their online nicknames.

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[25] The offences with which the appellant was charged were comprised of:

- 16 counts of making, accessing, possessing, or distributing child pornography (s. 163.1 of the *Criminal Code*);
- 20 counts of extortion (s. 346 of the *Criminal Code*);
- two counts of uttering threats (s. 264.1 of the *Criminal Code*);
- four counts of invitation to sexual touching (s. 152 of the *Criminal Code*);
- four counts of making sexually explicit material available to a child for the purpose of facilitating commission of a sexual offence (s. 171.1 of the *Criminal Code*);
- 25 counts of child luring (s. 172.1 of the *Criminal Code*);
- two counts of arranging a sexual offence against a child (s. 172.2 of the *Criminal Code*); and
- 16 counts of breaching a 2009 prohibition order that prohibited the appellant from communicating by computer with a child under 14 years of age (s. 161 of the *Criminal Code*).

[26] As I have said, the Crown called two of the appellant's chat partners to testify at trial. The appellant was convicted of seven offences relating to them, none of which form the subject matter of the conviction appeal.

[27] The first chat partner witness, Chat Partner1 ("CP1"), testified that the appellant contacted her on a teen dating site in January 2013. She was 14 years

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old at the time and told him so. Initially, she thought he was an older teenager and sent him nude pictures of herself. After their first video chat she learned he was older, divorced and had three children. They chatted almost daily by video for more than a year. The appellant required her to be nude during many of their chats and would also encourage her to masturbate while on video. He threatened to post her nude photos online if she stopped chatting with him. Despite the threats, she testified that for a while she thought she was in love with him. They discussed marriage and having children together. Their chats stopped after the appellant was arrested in June 2014.

[28] The second chat partner to testify, Chat Partner2 (“CP2”), began communicating with the appellant in February 2014 when she was 14. Before learning he was older she showed him her naked breasts on video. He talked about having sex with her, and ejaculating inside her and sent her photos of his penis. He threatened to send a video of her naked images to her mother if she stopped chatting with him.

[29] In addition to CP1 and CP2, the Crown called 14 other witnesses, including two police officers who played primary roles in extracting, organizing and analyzing the chat evidence. Some of the Crown evidence indicated there was reason to believe that some of the appellant’s chat partners were adults, including offenders seeking to exchange pornographic materials. Further, near the end of one of the

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chats, the chat partner identified themselves as part of an organization aimed at trapping pedophiles.

[30] During the trial, the Crown withdrew four charges that related to communications with one online name (counts 23 to 26 – child luring, extortion, uttering threats and breach of the prohibition order) and also invited the trial judge to dismiss two charges relating to two further online names (counts 62 and 78 – both child luring). In his reasons, the trial judge dismissed one charge of accessing child pornography (count 2) because of a lack of evidence relating to the relevant time period. He also dismissed the 15 remaining counts of breaching the 2009 prohibition order because none of the alleged victims named in those counts testified and the Crown was not in a position to prove any of them were under the age of 14 years as specified in the prohibition order.

[31] Ultimately, the trial judge found the appellant guilty of 67 charges. However, he conditionally stayed 14 charges based on the *Kienapple*[4] principle. Accordingly, he entered 53 convictions.

[32] The following list itemizes the offences and counts with respect to which there were convictions (those that are the subject of the appellant's conviction appeal are bolded) or conditionally stayed findings of guilt:

[4] *Kienapple v. R.,* [1975] 1 S.C.R. 729.

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- 11 convictions for accessing, making, possessing or distributing child pornography contrary to s. 163.1 of the *Criminal Code* – (counts 1, 4, 5, 6, 7, 8, 19, 20, 28, 85, 86) no appeals; four conditional stays (counts 9, 10, 22, 84);
- 18 convictions for extortion contrary to s. 346 of the *Criminal Code* in relation to 17 online names – (counts 21, 29, 30, 34, 40, 45, 49, 52, 55, 59, 63, 68, 73, 77, 79, 83, 87, 88) no appeals; one conditional stay (count 13);
- one conviction for uttering threats contrary to s. 264.1 of the *Criminal Code* (count 12) no appeal;
- one conviction for invitation to sexual touching contrary to s. 152 of the *Criminal Code* – (count **60**) one appeal; three conditional stays (counts 14, 18, 58[5]);
- three convictions for distributing sexually explicit material to a child for the purpose of facilitating an offence contrary to s. 171.1 of the *Criminal Code* – (counts 17, **71**, **89**) two appeals, one conditional stay (count 33[6]);
- 17 convictions for child luring contrary to s. 172.1 of the *Criminal Code* – (counts **11**, 15, 16, **32**, **35**, **38**, **39**, **43**, **47**, **57**, **66**, **69**, **70**, **74**, **76**, **80**, **82**) 15 appeals, five conditional stays (counts 27, 41, 50, 53, 65);

[5] The appellant purports to appeal counts 14 and 58, but as will be explained, no appeal lies with respect to charges conditionally stayed pursuant to *Kienapple*.
[6] The appellant also purports to appeal this count.

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- two convictions for arranging a sexual offence against a child contrary to s. 172.2 of the *Criminal Code* – (counts **48**, **51**) two appeals.

C. ANALYSIS – THE CONVICTION APPEAL

(1) Are the Presumptions contained in ss. 171.1(3) and 172.2(3) of the *Criminal Code* unconstitutional?

[33] As I have said, the child exploitation offences of which the appellant was convicted each contain an identical element requiring either that the victim be under a specified age or that the accused believes the victim is under the specified age. For example, s. 172.1(1)(a), one of the child luring subsections, reads as follows:

> Every person commits an offence who, by a means of telecommunication, communicates with
>
> > (a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person under subsection 153(1), section 155, 163.1, 170, 171 or 279.011 or subsection 279.02(2), 279.03(2), 286.1(2), 286.2(2) or 286.3(2). [Emphasis added.]

[34] Similarly, each of the child exploitation offence provisions contains an identical presumption designed to assist the Crown with proof of the accused's belief in the age of the victim, where the Crown is not in a position to prove the victim's actual age. Section 172.1(3), the Presumption in relation to child luring, which the Supreme Court of Canada ruled unconstitutional, reads as follows:

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> Evidence that the person referred to in paragraph 1 (a), (b), or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age. [Emphasis added.]

[35] Sections 171.1(3) and 172.2(3) contain identical language to s. 172.1(3) save that the specified ages are set out in numeric form.

[36] As indicated above, the Crown does not oppose the appellant raising this issue for the first time on appeal and this court concluding that the Presumptions in ss. 171.1(3) and 172.2(3) violate s. 11(d) of the *Charter*. Further, the Crown does not contend that these Presumptions can be saved under s. 1 of the *Charter*.

[37] I see no principled basis to distinguish s. 172.1(3), the provision struck down in *Morrison*, from the Presumptions at issue in this case. The language in the Presumptions at issue in this case is identical to s. 172.1(3). Moreover, the Presumptions all have the same effect. They allow the Crown to obtain a conviction despite the existence of a reasonable doubt because the fact that a representation of age was made to an accused does not inexorably lead to the conclusion that the accused believed that conclusion: *Morrison*, at paras. 51, 56.

[38] Accordingly, I find that ss. 171.1(3) and 172.2(3) infringe s. 11(d) of the *Charter* and cannot be saved under s. 1.

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(2) Did the trial judge err by relying on the Presumptions to convict the appellant of 19 child exploitation offences under ss. 171.1, 172.1 and 172.2 involving victims who did not testify?

(a) The trial judge's reasons

[39] After reviewing the evidence at trial, the trial judge divided the balance of his reasons into what he considered were the two issues at trial:

i. identity and possession, i.e., whether the appellant's online identity had been established and whether possession (knowledge and control) of child pornography had been proven; and

ii. if the first issue had been proven, whether there was evidence to establish each element of each count in the indictment.

[40] On the first issue, the trial judge was satisfied the Crown had presented an overwhelming case proving identity and possession based on circumstantial evidence. He therefore dismissed an application made by the Crown at the close of its case to have count-to-count similar fact evidence admitted on the issue of identity.

[41] Concerning the second issue, the trial judge reviewed the law in relation to some of the offences charged before turning to a count-by-count analysis of the charges relating to each of the alleged victims.

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[42] The trial judge's preliminary review of the law related to the following offences: child luring; possession, accessing and distribution of child pornography; and breach of the prohibition order.

[43] Concerning child luring, the trial judge quoted from two of the leading authorities at the time to illustrate the nature of the offences and how they could be proven, *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, at paras. 28-32, 36, and 37, and *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3, at paras. 27-31. The quotations from *Levigne* relating to proof of child luring included paraphrases of the child luring Presumption and the related "no defence" provision.

[44] After reviewing the law, the trial judge conducted a complainant-by-complainant, count-by-count analysis of whether the offences had been proven.

[45] For most complainants, there were many counts to be considered. In such cases, the trial judge conducted one review of all of the charges. In most instances, after setting out the charges, the trial judge identified the portion of the chat where the alleged victim represented their age, quoted brief portions of the chat evidence relevant to proof of the various offences, and then stated his conclusion concerning whether a conviction or stay should be entered for each charge or whether a particular count should be dismissed.

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[46] In his complainant-by-complainant, count-by-count review of the charges, the trial judge did not refer explicitly to the child luring Presumption in s. 172.1(3) of the *Criminal Code*. Nor did he refer at all in his reasons to the Presumptions in ss. 171.1(3) and 172.2(3). Other than setting out the content of the particular chat and the represented age of the alleged victim, rarely did the trial judge conduct any analysis of whether the child exploitation offences had been proven.

[47] As I have said, in addition to 33 other convictions, ultimately the trial judge entered convictions against the appellant for 19 child exploitation offences involving victims who did not testify.

(b) The appellant's position.

[48] The appellant appeals his 19 convictions for child exploitation offences involving victims who did not testify. In relation to each of these charges, the onus was on the Crown to prove beyond a reasonable doubt that the appellant believed the victim was under the age specified in the subsection under which he was charged.

[49] While acknowledging that the trial judge did not refer to the Presumptions in his complainant-by-complainant, count-by-count analysis of whether the elements of the offences had been proven, the appellant submits that the structure, language and content of the trial judge's reasons demonstrates that he relied on the Presumptions to make findings of guilt and enter convictions. As the Presumptions

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have now been declared unconstitutional, the appellant submits that the trial judge erred in law in convicting him of those offences.

(c) The Crown's position.

[50] The Crown submits that when the trial judge's reasons are read as a whole in the context of the record that was before him, it is apparent that he did not rely on the Presumptions to make findings of guilt in relation to the impugned convictions. Rather, says the Crown, the trial judge relied on the large body of circumstantial evidence before him contained in the chat evidence to conclude that the appellant believed that the victims who did not testify were under the relevant age.

[51] Although acknowledging that the trial judge was aware of the Presumption in s. 172.1(3) of the *Criminal Code* in relation to the child luring offences, the Crown relies on the fact that the trial judge did not refer to that Presumption in his complainant-by-complainant, count-by-count analysis of the offences. Further, the trial judge made no reference at all in his reasons to the Presumptions contained in ss. 171.1(3) or 172.2(3) of the *Criminal Code*. The explanation for this, says the Crown, is that, in the particular circumstances of this case, it was unnecessary for the trial judge to resort to the Presumptions to make the necessary findings of guilt.

[52] The Crown submits that the 18 extortion convictions provide an important backdrop to the convictions for the child exploitation offences because they

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demonstrate the trial judge's thinking about the appellant's belief in the age of his victims. The Presumptions do not apply to extortion. Although belief that the victims were under a specified age is not an element of the offence of extortion, an intention to obtain something from the victim or to induce the victim to do something is.

[53] The appellant's chats with the victims of the child exploitation offences involving victims who did not testify followed a similar pattern. Very early in each chat, the appellant would inquire about the victim's age. When the victim revealed they were under 16[7], the appellant would ask for nude photographs or photographs of sexual acts. If he encountered resistance, the appellant would resort to threats of a kind that would resonate with children. For example, a threat to tell the victim's parents of some incriminating fact he had uncovered.

[54] Because the appellant's threats to the victims were generally of a nature that would resonate with children, the Crown asserts that the convictions on the extortion counts demonstrate that the trial judge assessed the evidence to determine what the appellant believed about the age of his victims – absent a belief

[7] With one exception, the convictions forming the subject matter of the appeal involved chat partners who represented that they were under 16. The exception was the sister of another chat partner (the "original chat partner"). The original chat partner represented that her sister was 16, which the sister later confirmed.

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that the victims were children, the appellant's threats would not have the desired impact and would not support the necessary intent to induce or extort the victims.

[55] The Crown submits that the extortion convictions reveal that the trial judge did the work of assessing the chat evidence to determine if the appellant believed that his victims were underage. Implicit in the extortion convictions, says the Crown, is confirmation that the trial judge did not require the Presumptions to find the appellant's belief in age.

[56] In addition, the Crown contends that many passages of the trial judge's reasons confirm that the trial judge was satisfied that the only reasonable inference arising from the totality of the circumstantial evidence in relation to the child exploitation offences where the victim did not testify was that the appellant believed he was speaking to children or young teenagers of their stated age whom he had sought out on the internet and did not resort to the Presumptions.

[57] Further, the Crown submits that the trial judge's reasons also demonstrate that he considered and rejected the various alternative inferences raised by the police evidence concerning whether the appellant believed the child exploitation chat partners who did not testify were underage.

(d) Discussion

[58] Although the trial judge did not refer explicitly to the Presumptions when making findings concerning each of the impugned convictions, when read as a

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whole, I am satisfied that his reasons make it clear that he relied on the Presumptions to make findings of guilt and ultimately enter convictions in relation to the child exploitation offences involving victims who did not testify. I reach this conclusion for several reasons.

[59] First, when considering the trial judge's reasons, it is important to recall that the Presumptions were part of the law as it stood when this case was litigated, and when the trial judge wrote his reasons. For that reason, factors such as the trial judge's failure to refer to all of the Presumptions and failure to refer to any of them in his complainant-by-complainant, count-by-count analysis of the charges are of limited, if any, significance.

[60] Trial judges are presumed to know the law. This trial judge was faced with an 83 count[8] indictment involving multiple charges. It was not necessary that he specifically review the law relating to each charge, particularly where, in the case of the child exploitation offences, the presence and operation of the Presumptions was identical.

[61] Further, having reviewed the law concerning the child luring Presumption, unless the circumstance of a particular count required it, it was unnecessary that the trial judge do more than refer to a representation of age in any particular chat

[8] Six of the 89 counts were withdrawn or dismissed at the request of the Crown.

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to resort to a Presumption or make it applicable. The Presumptions were part of the law.

[62] Second, I would not accept the Crown's submissions that it is implicit in the extortion convictions that the trial judge did not require the Presumptions to find belief in age. Given that the Presumptions were part of the law relating to the child exploitation offences, the suggestion that the trial judge would consider the extortion offences separately and then decide if it was necessary to resort to the Presumptions in relation to the child exploitation offences seems fanciful.

[63] In any event, the Crown acknowledges that belief that the victims were under a specified age is not an element of the offence of extortion. The Crown relies on the fact that many of the threats that grounded the extortion convictions would be ineffective unless made to children. However, absent additional evidence or specific findings by the trial judge, I fail to see how any particular threat conclusively demonstrates anything more than that the appellant was fishing for a child victim as opposed to belief that the victim was a child. In this regard, it is important to remember that the trial judge dismissed the Crown's count-to-count similar fact evidence application and that the Crown's application was for the limited purpose of proof of identity in any event.

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[64] Further, there were no extortion convictions in relation to five of the 13 child exploitation offence victims with respect to whom the appellant is appealing. This, in itself, undermines the Crown's argument.

[65] Finally, as I read the trial judge's reasons, they signify clearly that he was relying on the Presumptions.

[66] As noted above, while reviewing the law relating to child luring the trial judge quoted from *Levigne*. The quotations included the following paraphrases of the child luring Presumption and the "no defence" provision:

> Third, pursuant to s. 172.1(3), evidence that the target of the communication was represented to the accused to be under the specified age, "is, in the absence of evidence to the contrary, proof that the accused believed the person was under that age".
>
> …
>
> Finally, in virtue of s. 172.1(4), that the accused believed the person with whom he or she communicated was not underage will afford no defence to the charge "unless the accused took reasonable steps to ascertain the age of the person".

[67] Immediately after quoting these passages, at para. 92 of his reasons, the trial judge said the following:

> In this prosecution, <u>there is no evidence that the [appellant] did anything more to establish age than ask and then move forward with the conversation</u>. There appeared to be no youthful boundary for his sexualized discussions. His interests often turned to whether they had had a "period" and could become pregnant. [Emphasis added.]

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[68] The trial judge then reviewed and rejected two defence arguments made in relation to the child luring offences to the effect that some of the chat evidence appeared to suggest that appellant had previous online contact with some of the chat partners not disclosed in the chat evidence and that some of the chats reflected adults fantasizing.

[69] The trial judge found that the chat evidence captured entire conversations and revealed no gaps. Further, he said the following at para. 99 of his reasons:

> There is not one piece of evidence that does not point to the fact that the [appellant] thought he was conducting a conversation with a youthful female complainant. Far from taking diligent steps to ascertain age, it seems he was getting the exact conversation he sought. While I accept that as true, each allegation still needs to be examined to ascertain if the elements of the offence are present. [Emphasis added.]

[70] As noted in *Levigne*, at para. 32, and confirmed in *Morrison*, at para. 48, evidence to the contrary capable of rebutting a Presumption had to include evidence that the accused took reasonable steps to ascertain the other person's age. Accordingly, as I read these portions of the trial judge's reasons, they demonstrate that in his preliminary review of the law relating to child luring, he considered the child luring Presumption and the no defence provision applicable to it. He then determined that there was no evidence to the contrary and that no reasonable steps were taken by the appellant to determine his chat partner's ages that could overcome the no defence provision. Thus, there was no evidence to the

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contrary. These same factual conclusions would, of course, apply to each of the presumptions that operated according to the law as it was understood at the time.

[71] I am therefore satisfied that before turning to his complainant-by-complainant, count-by-count consideration of the elements of each offence, the trial judge considered the Presumptions and rejected any applicable defences.

[72] The trial judge returned to the subject of proof of the child luring offences when discussing the law relating to proof of breach of the 2009 order prohibiting the appellant from communicating by computer with persons under the age of 14 (the "s. 161 charges"). In particular, he contrasted the evidence necessary to prove those charges with the required proof for the child luring charges.

[73] Concerning the s. 161 charges, the trial judge noted that it was necessary that the Crown prove that each of the complainants in relation to these charges was in fact under the age of 14 years. He concluded that all of the s. 161 charges had to be dismissed because the Crown had not led evidence to prove the age of any of the complainants with respect to these charges[9].

[74] By way of contrast, with respect to the "luring" offences, at para. 108 of his reasons, the trial judge said:

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[9] Concerning the two complainants who testified, CP1 was over 14 and there was no s. 161 offence alleged for CP2.

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> The luring offences only require evidence that [the appellant] believed the complainants were under 18, 16 or 14 years of age. The responses provided proof, absent evidence to the contrary, that [the appellant] believed the complainant was the stated age (s. 172.1(3)). [Emphasis added.]

[75] As I read para. 108, it is a clear statement that the trial judge would be applying the child luring Presumption and that it would prevail absent evidence to the contrary.

[76] The trial judge then proceeded with his complainant-by-complainant, count-by-count analysis of whether the elements of each of the offences had been proven.

[77] As I have said, when the trial judge carried out this analysis, in general, other than setting out the contents of the chat and the represented age of the victim, he did not otherwise analyze whether the child exploitation offences had been proven. One exception is at para. 128 of the trial judge's reasons, where, after setting out the relevant chat evidence, the trial judge said the following concerning Crown evidence suggesting the chat partner was an adult:

> It was the evidence of [name of police officer] that this complainant was likely not who she pretended to be. He felt the language, lack of spelling errors and content led him to believe this person was not 11 but rather an adult. There is, however, no evidence that [the appellant] felt she was anyone other than the 11 year old with whom he set out to communicate. [Emphasis added.]

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[78] Considered in the context of the trial judge's preliminary review of the law and rejection of the defences raised at trial, referenced at paragraphs 65 to 70 above, I read this statement as a clear indication that the trial judge was applying the Presumption. Contrary to the Crown's submissions, I do not read para. 128 as meaning the trial judge was assessing whether there were competing inferences to be drawn from the circumstantial evidence identified by the police officer. Rather, I read this paragraph as indicating the trial judge was determining whether there was evidence to the contrary to defeat the Presumption.

[79] Based on the foregoing reasons, I would accept the appellant's submission that the trial judge erred by relying on the Presumptions to convict him of offences under ss. 171.2, 172.1 and 172.2 in relation to the victims who did not testify.

(3) Should this court rely on the proviso to uphold the appellant's convictions for offences under ss. 171.2, 172.1 and 172.2 in relation to the victims who did not testify?

[80] In all the circumstances of this case, I would not apply the proviso to uphold the appellant's 19 convictions for child exploitation offences in relation to victims who did not testify.

[81] The language of s. 686(1)(b)(iii) is permissive, not mandatory. The section provides that the court of appeal "may" dismiss an appeal despite an error in law

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where it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

[82] Appellate courts have declined to apply the proviso where, for example making the decisions necessary to consider the curative proviso would have provided "serious challenges for appellate review": *R. v. Sahdev*, 2017 ONCA 900, 356 C.C.C. (3d) 137, at paras. 41-43.

[83] In this case, the law has changed in a significant way since the matter was litigated and the trial judge wrote his reasons. The Presumptions that applied at the time of trial have been declared unconstitutional. As the trial judge relied on the Presumptions, this court would have to make its own findings based on the totality of the record to uphold the convictions.

[84] In my view, the submissions we have received to date are simply not adequate to permit us to do so. More would be required in the form, at least, of further written submissions[10] .

[85] Equally, if not more important, however, is the fact that the appellant litigated these charges under a different legal regime. Applying the proviso at this stage would deprive him unfairly of the opportunity to conduct a trial with respect to these charges under the correct legal landscape.

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[10] During oral submissions at the appeal hearing, we raised with counsel that the appellant had not filed a reply factum in response to the Crown's submissions concerning the proviso.

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[86] As already indicated, during oral submissions on appeal, appellant's counsel conceded that this court should apply the proviso with respect to count 38 because the chat evidence indicates the appellant and his chat partner were on live video at the time.

[87] I am not persuaded it would be appropriate to accept appellant's counsel's concession. It does not appear that there is a recording of the video chat included in the appeal record nor does it appear that such a recording formed part of the record before the trial judge. In the absence of that evidence, I fail to see how the fact that the appellant could see someone on the video while chatting assists with proving beyond a reasonable doubt that the appellant believed that person was under the specified age of 18 years. Without a recording of the video chat, we are left without evidence concerning age the person on video appeared to be.

(4) Should this court substitute a conviction for attempted invitation to sexual touching on count 60 in place of the conviction entered by the trial judge for invitation to sexual touching.

[88] As noted at para. 16 above, the Crown concedes that the conviction entered on count 60, a charge of invitation to sexual touching, should be set aside because the alleged victim did not testify. The Crown was not therefore in a position to prove that the alleged victim was under the age of 16 years as required under s. 152 of the *Criminal Code*.

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[89] However, the Crown submits that, as the "appellant clearly believed that he was directing a 14 year old boy to engage in sexual touching with his 7 year old sister", this court should substitute a conviction for attempted invitation to sexual touching.

[90] I would not accede to this request for two reasons.

[91] First, the Crown has not provided comprehensive submissions on the applicable *mens rea* for attempted invitation to sexual touching, in particular the question whether recklessness as to age will suffice. For example, see *R. v. Carbone*, 2020 ONCA 394, 150 O.R. (3d) 758, at para. 131, where the court held that recklessness will suffice for the completed offence under s. 152 of the *Criminal Code*. However, see also *R. c. Colborne*, (1991), 66 C.C.C. (3d) 235 (Q.C.C.A.) commenting on the intent required for attempts post-*Ancio*[11].

[92] Second, to substitute a conviction for attempted invitation to sexual touching, this court would have to make a finding that the appellant believed the alleged victim of that offence was under the age of 16, wilfully blind, or possibly reckless in that regard.

[11] *R. v. Ancio*, [1984] 1 S.C.R. 225.

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[93] The Crown has not identified the evidence on which it relies to assert that "the appellant clearly believed that he was directing a 14 year old boy to engage in sexual touching with his 7 year old sister".

[94] The trial judge's findings on the issue do not assist. He cited chat evidence that included a representation by the alleged victim that he was 14 years old and found the charge was "substantiated on this evidence". However, the trial judge obviously did not turn his mind to the requirement with respect to this offence that the Crown prove the victim's age beyond a reasonable doubt rather than merely belief in age.

[95] In all the circumstances, I do not consider this an appropriate situation in which to substitute a conviction for an attempt and would set aside the conviction on count 60.

(5) The appellant's appeal of counts that were conditionally stayed pursuant to *Kienapple.*

[96] The appellant purports to appeal three counts that the trial judge conditionally stayed pursuant to *Kienapple*: counts 14 and 58 (invitation to sexual touching); and count 33 (making sexually explicit material available to a child to facilitate an offence).

[97] A *Kienapple* stay is conditional on the final disposition of the charge for which there was a conviction. If an appeal in relation to that charge is allowed and a new

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trial is ordered, the conditional stay dissolves and the stayed count is also remitted back to the trial court. Otherwise, the stay becomes permanent: See, for example, *R. v. Drury*, 2020 ONCA 502, 391 C.C.C. (3d) 18, at paras. 78-81, 87.

[98] The appellant is appealing two of the charges to which the stayed counts he purports to appeal relate. Count 14 appears to have been stayed based on the conviction for count 11 (child luring), which the appellant is appealing. Count 58 was stayed based on the conviction for count 57 (child luring), which the appellant is appealing. Whether the stays on counts 14 and 58 become final follows from the results of his appeal on counts 11 and 57.

[99] Count 33 was stayed based on the conviction for count 6 (distribution of child pornography), which the appellant is not appealing. The stay on count 33 is therefore final and not subject to appeal.

D. THE SENTENCE APPEAL

[100] As I have said, in November 2017, the trial judge designated the appellant as a dangerous offender, sentenced him to a determinate sentence of 11 years' imprisonment less 60.5 months credit for presentence custody, leaving a remaining sentence of imprisonment of 5 years, 11 months and 15 days, and imposed a 10-year LTSO.

[101] The appellant submits that, whether his conviction appeal is allowed, the determinate period of imprisonment imposed as part of his sentence should be

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varied to time served. He contends that the determinate period of imprisonment imposed by the trial judge is longer than that recommended by the Crown's expert at trial (six to nine years), and, in any event, is demonstrably unfit. If his conviction appeal is allowed, the appellant further argues that his level of moral culpability is significantly reduced, thus requiring that the determinate period of imprisonment imposed by the trial judge be reduced.

[102] Finally, the appellant submits that the concurrent determinate sentences of 11 years imprisonment imposed in relation to four of his convictions (counts 1, 20, 85 and 12) are illegal as they exceed the maximum permissible sentence under the *Criminal Code*.

[103] Apart from varying any illegal sentences to legal sentences, I would not accept the appellant's submissions.

[104] Although I would allow the appellant's conviction appeal and set aside 20 of his 53 convictions, and would vary the illegal sentences imposed, I see no basis on which to interfere with the global determinate sentence of 11 years' imprisonment imposed by the trial judge, or with the trial judge's imposition of a remaining sentence of imprisonment of 5 years, 11 months and 15 days, to be followed by a 10-year LTSO.

[105] As noted above, the appellant appealed 20 of his 53 convictions. The 33 convictions that were not appealed are comprised of:

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- 11 counts of accessing, making, possessing or distributing child pornography;
- 18 counts of extortion;
- one count of uttering threats;
- one count of distributing sexually explicit material to a child for the purpose of facilitating an offence under s. 152 of the *Criminal Code*;
- two counts of child luring.

[106] Given the nature and number of the convictions that I would leave untouched, I do not accept that the appellant's moral culpability has been much reduced or that the original sentence imposed has become disproportionate or otherwise unfit, despite the many child exploitation offences and one conviction for invitation to sexual touching that I would set aside.

[107] Seven of the remaining 33 convictions relate to the two victims who testified at trial. Both met the appellant online when they were 14 years old. One communicated with him almost daily for close to 17 months during which time she was subjected to significant sexual and emotional abuse. Both victims who testified suffered dehumanizing exploitation through the unrelenting manipulative behaviour of the appellant.

[108] Further, as noted by the Crown, regardless of the true identities of the appellant's other chat partners, much of the conduct at the heart of this appeal

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involved the creation of child pornography and threatening behaviour intended to induce others to supply child pornography to the appellant.

[109] As noted by the trial judge, the appellant also has a related record dating back to 1983, with the most serious conviction involving the abduction of a 14-year-old girl in 2009. This is an important aggravating factor. Further, the appellant has been diagnosed as suffering from pedohebephilia with anti-social personality traits and his actuarial risk assessments suggests a high risk of re-offence.

[110] I conclude that the combination of the sheer number of serious offences of which the appellant remains convicted together with the serious societal and individual impacts of his crimes continues to justify the global sentence imposed by the trial judge, who in arriving at a fit sentence, took account of all mitigating factors as well as the totality principle.

[111] I turn now to the legality of the determinate sentences imposed by the trial judge.

[112] In his oral and written submissions on appeal, the appellant contended that the concurrent determinate sentences imposed by the trial judge on counts 1, 20, 85, (all child pornography offences carrying a maximum sentence of 10 years imprisonment) and 12 (a conviction for uttering threats to cause bodily harm

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carrying a maximum sentence of five years imprisonment) are illegal because they exceed the maximum permissible sentence under the *Criminal Code*.

[113] Following the oral hearing we sought further written submissions from counsel to clarify the implications of a discrepancy between the sentence as set out in the trial judge's written and oral reasons and as recorded on the indictment.

[114] In his written and oral reasons the trial judge found that an 11-year global determinate sentence was appropriate and stated his intention to give the appellant 60.5 months credit for pre-sentence custody. He then imposed the remaining sentence, which he originally miscalculated as "4 years, 11 months, 15 days on Count 1, and on each of the other 52 counts concurrently". He subsequently corrected "4 years" to "5 years" in his written reasons by handwritten endorsement and also clarified orally that the remaining sentence was five years 11 months and 15 days.

[115] Paragraphs 80 to 82 of the trial judge's written reasons read as follows:

> I find that an appropriate global period of incarceration is 11 years.
>
> I recognize that, in my view, the offences amount to one continuous period of criminality and should attract concurrent sentences.
>
> The offender will have the benefit of his 41 months of incarceration with a credit of 1.5 to 1 or 60.5 months. There will then be a period of 4 [corrected to 5 by handwritten endorsement] years, 11 months 15 days left to serve. That sentence can be directed as 4 [corrected

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> to 5 by handwritten endorsement] years, 11 months 15 days on Count 1 and, on each of the other 52 counts concurrently; those counts being….

[116] The transcript of the sentencing hearing discloses that the trial judge read the uncorrected version of paragraphs 80 to 82 of his written reasons into the record[12] along with the balance of his sentencing reasons. Following a recess in the sentencing hearing, the trial judge returned to the courtroom and said the following:

> Alright. So, let me return to the [appellant's] matter for a correction with respect to my mathematical calculations. I thank the members of the audience that are able to calculate. …
>
> I apologize to you Mr. [N.] My calculation indicated that there was a balance of four years, 11 months, 15 days. In fact, I was out by a year. <u>The appropriate remnant of your sentence yet to be served is five years, 11 months and 15 days on count one, and on each of the other enumerated counts to be served concurrently</u>, alright? [Emphasis added.]

[117] However, on the indictment, the trial judge recorded the sentence in handwriting as five years, 11 months, 15 days in relation to count 1 but as 4 years, 11 months, 15 days in relation to the remaining counts:

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[12] The transcript version of paragraph 81 reads as follows:

> I recognize that, in my view, the offences amount to one continuous period of criminality and should attract, <u>therefore</u>, concurrent sentences. [Emphasis added.]

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> For written reasons marked as ExH. D the sentence is the following. A global sentence of 11 years reduced by 41 months of p.sc. or 60.5 months @ 1:5 – 1:00 credit.
>
> Therefore ct. 1 sentence of 4 [corrected to 5] years, 11 months, 15 days with a sentence of 4 years, 11 months, 15 days on cts [list of remaining counts] concurrent. [Emphasis added.]

[118] Counsel acknowledge that where there is a discrepancy of this type in the quantum of the sentence imposed between a trial judge's reasons and the endorsement on the indictment, the trial judge's intention should govern and can be assessed through reference to all of the reasons, the indictment and the warrant of committal. See *R. v. Krouglov*, 2017 ONCA 197, at paras. 35-40, and *R. v. Malicia* (2006), 216 O.A.C. 252, 82 O.R. (3d) 772, at paras. 26-31.

[119] Here, in my view, the trial judge's intention to correct his calculation error in relation to the quantum of the remaining determinate sentence on all counts is manifest in his after-the-fact oral statement on the record and in paragraphs 80 to 82 of his written reasons as corrected by handwritten endorsement. He corrected the remaining sentence to accord with the global determinate sentence he imposed of 11 years imprisonment less 60.5 months credit for pre-sentence custody leaving a remaining sentence of five years, 11 months and 15 days. This correction is also reflected in the warrant of committal. In all the circumstances, his failure to correct the remnant determinate sentence on the indictment with respect to all counts other than count 1 is an obvious clerical error.

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[120] Similarly, in my view, the trial judge's intention to impose a global determinate sentence of 11 years imprisonment less pre-sentence custody on all counts concurrently is manifest in the same paragraphs of his written reasons and in his after-the-fact oral statement on the record that the remnant sentence to be served on count 1 and each of the other enumerated counts is five years, 11 months and 15 days. Although the warrant of committal reflects a global sentence of 11 years imprisonment less credit for pre-sentence custody only in relation to count 1, it is not clear to me whether it was signed by a clerk of the court or the trial judge. Even assuming the warrant of committal was signed by the trial judge, in my view, the trial judge's intention as reflected in his written reasons and after-the-fact oral statement would override what is, in this case, a lengthy typewritten form.

[121] I would therefore treat the determinate sentence imposed by the trial judge as being a global sentence of 11 years imprisonment less 60.5 months credit for pre-sentence custody leaving a remaining sentence of 5 years, 11 months, 15 days concurrent on all counts for which convictions remain.

[122] In doing so, I note that it is not precisely accurate to say that the determinate sentence imposed by the trial judge was an 11-year sentence. Rather, the determinate sentence imposed was 5 years, 11 months and 15 days, being the remnant sentence left to serve after deducting the credit for pre-sentence custody granted by the trial judge. This is because, subject to certain exceptions, a term of

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imprisonment is considered to begin on the day that it is imposed, i.e. after taking into account pre-sentence custody. See *R. v. Mathieu*, 2008 SCC 21, at paras. 6, 7 and 14.

[123] However, while a sentence begins on the day it is imposed, in *R. v. Walker*, 2017 ONCA 39, at paras. 14 to 28, this court explained that a sentence will nonetheless be illegal if the sentence imposed plus pre-sentence custody exceeds the maximum allowable sentence under the *Criminal Code*.

[124] As the determinate sentences imposed on counts 1, 20, 85 and 12 plus pre-sentence custody exceed the maximum permissible sentences for those offences under the *Criminal Code*, I would set those sentences aside. On counts 1, 20 and 85 I would substitute a sentence of 4 years, 11 months, 15 days, concurrent. On count 12, I would substitute a sentence of time served, five years, concurrent.

E. DISPOSITION

[125] Based on the foregoing reasons, I would declare ss. 171.1(3) and 172.2(3) of the *Criminal Code* to be of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*, allow the appellant's conviction appeal, set aside his convictions on counts 11, 32, 35, 38, 39, 43, 47, 48, 51, 57, 60, 66, 69, 70, 71, 74, 76, 80, 82 and 89, and order a new trial on those counts. As count 14 was stayed

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in relation to count 11 and count 58 was stayed in relation to count 57, those stays dissolve and are remitted to the trial court for a new trial.

[126] Concerning sentence, I would vary the sentence imposed by the trial judge in accordance with paragraphs 121 to 124 of these reasons. I would otherwise dismiss the sentence appeal and order that all other terms of the sentence imposed by the trial judge remain in full force and effect with respect to the counts on which convictions remain.

[127] Given that I would not interfere with the global sentence imposed by the trial judge, I would urge the Crown to exercise its discretion not to proceed with a new trial on the counts with respect to which a new trial has been ordered.

Released: August 25, 2023 “J.S.”

“Janet Simmons J.A.”
“I agree. David M. Paciocco J.A.”
“I agree. B. Zarnett J.A.”

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