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R v EJB: Another Unconstitutional Mandatory Minimum Sentence

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Case Commented On: *R v EJB*, 2017 ABQB 726 (CanLII)

In a previous post, Professor Erin Sheley commented that *R v Nur*, 2015 SCC 15 (CanLII), may have started a "widespread dismantling of the *Criminal Code's* policy of gun-related mandatory minimums." Since *Nur*, constitutional challenges to mandatory minimums have reached beyond gun-related crimes. The Supreme Court of Canada in *R v Lloyd*, 2016 SCC 13 (CanLII), held the one-year mandatory minimum for drug trafficking under s 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*, SC 1996 c 19, to be unconstitutional (at para 56). By doing so, the SCC left other offences with mandatory minimums vulnerable to constitutional challenge under s 12 of the *Charter*. Following *Lloyd*, the recent Court of Queen's Bench decision *R v EJB* found the one-year mandatory minimum for sexual exploitation under s 153(1.1)(a) of the *Criminal Code*, RSC 1985, c C-46, to be of no force or effect (at para 90).

The *EJB* Decision

EJB was a 35-year-old married father of three children when he engaged in a three-month consensual sexual relationship with the victim, EJB's then-16-year-old niece by marriage (at para 3). The victim was described as a rebellious teen who initiated the sexual relationship with EJB. The relationship terminated when EJB's wife walked in on them having intercourse (at paras 5 and 6). In June 2017, the Court of Appeal overturned EJB's acquittal at trial under s 153(1) of the *Code*, and convicted him for engaging in sexual relations with a young person while being in a position of trust or authority (at para 9). The Court of Appeal then remitted the matter back to the Court of Queen's Bench for sentencing. Justice Karen Horner decided that although the one-year mandatory minimum for sexual exploitation under s 153(1.1)(a) of the *Code* does not violate EJB's s 12 *Charter* rights, it does violate a hypothetical offender's s 12 rights (at paras 73 and 80). After determining this violation cannot be upheld under s 1 of the *Charter*, the Court declared it to be of no force or effect (at para 90).

EJB clearly and extensively sets out the current approach to a mandatory minimum sentence challenge under s 12 of the *Charter*. To determine whether a mandatory minimum is cruel and unusual punishment, the Court must ask: (1) "what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in [sections 718 to 718.2 of] the *Criminal Code*," and (2) "whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence" (at para 29). The second step of the test allows the Court to determine whether the mandatory minimum is grossly disproportionate for the: (a) accused, and (b) hypothetical offender in reasonably foreseeable circumstances (at para 30). If the sentence is grossly disproportionate for either the accused or

the hypothetical offender, it violates s 12 and must be justified under s 1 of the *Charter* (at para 29).

When determining the appropriate proportionate sentence for EJB, the Court examines the factors listed in ss 718 and 718.2 of the *Code*, as well as case law similar to EJB's circumstances (at paras 31 and 40-43). The Court states the determination of "a fit and proportionate sentence is a highly individualized process" and dependent on a unique set of aggravating and mitigating factors (at paras 52 and 55). The aggravating factors include EJB's blameworthiness in abusing a familial relationship, his failure to voluntarily end the relationship, and the vast age disparity. The mitigating factors include EJB's lack of control over the victim, the lack of known harm to the victim, EJB's willing confession to the police, his lack of a prior criminal record, EJB being the sole means of income for his family, and the lengthy and unavoidable process delay (at para 55). By balancing these factors, the Court concludes a fit and proportionate sentence for EJB is between six months and one and a half years (at para 55).

The Court then determines the one-year mandatory minimum is not grossly disproportionate to EJB's appropriate sentence of six months to one and a half years. A finding of a grossly disproportionate sentence is a high bar because the sentence must be "'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society" (at para 58).

However, s 153(1.1)(a) of the *Code* is grossly disproportionate when applied to a hypothetical offender in reasonably foreseeable circumstances. When determining the proper characteristics and circumstances of the hypothetical offender, the court must not entertain "extreme" or "far-fetched" examples. Instead, it may draw from past cases or from judicial experience and common sense (at paras 75 and 76, citing *Nur* and *R v Morrisey*, 2000 SCC 39 (CanLII)). In *EJB*, the Court draws from hypothetical scenarios set out in *R v Cristoferi-Paolucci*, 2017 ONSC 4246 (CanLII). One of the scenarios involves a first-time 20-year-old offender who, as a family friend and occasional babysitter to a 17-year-old, is given permission by the 17-year-old to touch her breasts over clothing. The Court determines the proper sentence for this type of offender is between 60 to 90 days. Therefore, a mandatory minimum sentence of one year is grossly disproportionate in these reasonably foreseeable circumstances (at paras 78-80) and s 153(1.1)(a) of the *Code* violates s 12 of the *Charter*.

The Court in *EJB* also holds that s 153(1.1)(a) cannot be upheld under s 1 of the *Charter*. Although there is a rational connection, there is no minimal impairment since s 153(1.1)(a) is applicable to too wide a range of offenders, capturing those who fall far below the one-year mandatory minimum (at para 87). In addition, the Court recognizes that it is "exceedingly difficult to prove that a grossly disproportionate mandatory minimum sentence is proportionate under section 1" (at para 89).

The Positive Effects of *EJB*

The decision in *EJB* can be seen as a result of the SCC's decision in *Lloyd.* As mentioned above, *Lloyd* left mandatory minimums vulnerable to constitutional challenge under s 12 of the *Charter*. In part, this is due to the SCC's reasoning that offences subject to mandatory minimums "can be committed in many ways and under many different circumstances by a wide range of people."

Therefore, they are "constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence" (at para 3). This broad language signals to lower courts that they should not shy away from holding mandatory minimum sentences unconstitutional. Mirroring the language in *Lloyd*, the Court in *EJB* reasons, "[a] mandatory minimum sentence of one year imprisonment will not be fit and proportionate for all those offenders who may be caught under section 153(1.1)(a). Some offenders may deserve less severe custodial sentences…" (at para 87).

EJB is not the first lower court decision to recognize the unconstitutionality of mandatory minimums in *Criminal Code* sexual misconduct offences. As noted in *EJB*, the Court in *Cristoferi-Paulucci* found s 153(1.1)(a) to be grossly disproportionate for a hypothetical offender (at para 60). Similarly, the Court in *R v Laviolette*, 2016 ONSC 782 (CanLII), held the one-year mandatory minimum for sexual interference under s 151(a) unconstitutional for a hypothetical offender.

This trend in recognizing the unconstitutionality of mandatory minimums may result in an increase in proportionate and just sentencing outcomes. One of the main arguments for mandatory minimums is that they create a deterrent effect. However, Michael Tonry, a professor of law at the University of Minnesota Law School, argues that there is no evidence that the enactment of mandatory minimums has significant deterrent effects. Instead, evidence shows mandatory minimums "foster circumvention by judges, juries and prosecutors; reduce accountability and transparency; produce injustices in many cases; and result in wide unwarranted disparities in the handling of similar cases" (see Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009) 38:1 *Crime and Justice* 65). This is similar to Mary Allen's findings in a recent Statistics Canada Report (see Statistics Canada, *Mandatory Minimum Penalties: An analysis of criminal justice system outcomes for selected offences* (Ottawa: Statistics Canada, 29 August 2017) at 3. In addition, research into mandatory minimum sentences for sexual violations against children, child pornography, and firearms-related offences shows the enactment of these sentences caused "a considerable increase in custody sentences, sometimes exceeding mandatory minimums prescribed by law" (Statistics Canada at 19-20). This evidence demonstrates there is in fact an "inflationary floor" resulting from mandatory minimum sentences (*R v King*, 2013 ABCA 3 (CanLII), at para 20). Therefore, striking down mandatory minimums may be a step forward in creating proportionate and just sentencing outcomes.

Constitutional Dialogue

The Harper government's tough on crime agenda created a number of new mandatory minimum sentences. Since then, the courts and Parliament have been engaged in constitutional dialogue surrounding mandatory minimums. *EJB* is part of this dialogue.

The SCC majority in *Lloyd* struck down one of Harper's mandatory minimums and asked Parliament to either narrow its reach "so that they only catch conduct that merits the mandatory minimum sentence" or "provide for residual judicial discretion to impose a fit and constitutional sentence in exceptional cases" (at para 3). Interestingly, the three-person dissent in *Lloyd* raised

the concern that Parliament is traditionally entitled to deference and "not obliged to create exemptions to mandatory minimums as a matter of constitutional law" (at paras 95 and 108).

When examining *EJB*, it appears the dissent's deferential approach to Parliament in *Lloyd* is not followed. In determining whether s 153(1.1)(a) of the *Code* violates s 12 of the *Charter*, the Court rarely mentions the objectives of Parliament. Notably, the Court acknowledges that Parliament clearly signalled that crimes against minors are to be treated more severely. However, this is immediately followed by the recognition that mandatory minimums create "inflationary floors," which artificially increase sentencing ranges (at para 49).

In light of *EJB* and recent decisions from the courts regarding mandatory minimums, Parliament appears to be responding to the issues raised. In 2015, the Minister of Justice and Attorney General of Canada was mandated to "conduct a review of the changes in [Canada's] criminal justice system and sentencing reforms over the past decade" (Statistics Canada at 3). One of the main causes for the mandate was the recent Supreme Court decisions on mandatory minimum sentences (at 3). Many are waiting for the Liberal government's promise to amend mandatory minimum provisions. Yvon Dandurand, a criminologist at the University of Fraser Valley, "suspects the coming legislation will include a mix of adding special exceptions to some mandatory minimum sentences while abolishing others".

As we wait for the amendments to mandatory minimums, *EJB* is a decision that shows constitutional dialogue between the courts and government is one of the major safeguards to problematic governmental legislation. This dialogue demonstrates a government's power is not absolute.

This post may be cited as: Daphne Wang "*R v EJB*: Another Unconstitutional Mandatory Minimum Sentence" (5 January, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/01/Blog_DW_EJB.pdf