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Charter of Rights and Freedoms — Cruel and unusual punishment

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Case Commented On: *R v Charboneau*, 2019 ABQB 882 (CanLII)

In this case, Court of Queen's Bench Justice L.R.A. Ackerl struck down the mandatory minimum six month sentence in s 286.1(2)(a) of the *Criminal Code*, RSC 1985 c C-46, as provided for the offence of obtaining sexual services from a minor. In this ruling, Justice Ackerl declared that the mandatory minimum sentence was not grossly disproportionate for the accused (Mr. Charboneau), but it would be unconstitutional for an individual in reasonably foreseeable cases.

Facts

On May 22, 2017, CM (the complainant) attended Lago Lindo School park to shoot basketball hoops by herself. After doing so she sat alone on a picnic table to rest and began playing a game on her phone. After about 5 to 10 minutes, the accused, Mr. Charboneau, who was a stranger to her, came to the picnic table where she was sitting. He asked if she would mind if he sat there. She responded, "No". He introduced himself as "Jules" and shook her hand (at paras 7-8).

The accused stayed at the table for about 15 minutes. For the first five to seven minutes, they talked about different things where she mentioned that she was 14 years old and in grade 9. The accused told her that he was done with high school already. After that, the conversation became more personal and sexual when he asked the complainant what her bra size was. He then stated that "this might seem inappropriate". She responded by saying "No", but she was "really uncomfortable at that point" (at paras 10-11).

The accused then asked the complainant three separate times to "flash him". She understood this meant exposing her breasts to him. She refused his first and second request in which he offered to pay her $20. She also refused his third request, where he offered to pay her $40, by replying "No, I'm not a prostitute" (at para 12).

The complainant testified that after that, the accused asked her about 10 times to go with him. He said, "Let's go have some fun to, like make some money", and told her there was money in his backpack. The complainant told him she was waiting for a friend who was expected to be there soon, but the accused kept "pressuring her to go with him" (at paras 13-14).

The complainant stated that during their interaction, "he called her beautiful and referenced her boobs were big." After that, he said, "Oh, I think I'm bothering you now. I'll just leave and let you be". The complainant did not answer. He then left and walked about 40 feet to his car. But before departing, he asked, "Is it okay if I think about you when I go home?" and if she was

going to think about him when he went home. He added, "Oh, what can I show you that will get you to show me something" (at paras 15-17).

Before going to the park, the accused had smoked one marijuana joint. He was 34 years old on the offence date; the complainant was 14 (at para 18).

Before trial, the accused filed an application seeking a declaration of the constitutional invalidity of *Criminal Code* s 286.1(2)(a). The application argued that this provision mandating a minimum six month sentence for communicating, for the purpose of obtaining for consideration, the sexual services of a person under age 18, contravenes s 12 of the *Canadian Charter of Rights and Freedoms* (at para 3).

Decision

The Accused was sentenced to nine months in jail and two years probation (at para 107). However, Justice Ackerl ruled that the mandatory minimum six month sentence for a first offence in s 286.1(2)(a) of the *Criminal Code* contravenes s 12 of the *Charter*. Justice Ackerl declared s 286.1(2)(a) of the *Criminal Code* to be of no force or effect under s 52 of the *Constitution Act, 1982* (at para 111).

Analysis

In April 2015, in *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773, the Supreme Court of Canada struck down, for the first time, a mandatory minimum sentence. Then in April 2016, the Supreme Court invalidated another mandatory minimum sentence in *R v Lloyd*, 2016 SCC 13 (CanLII), [2016] 1 SCR 130. Both cases were cited in *Charboneau.*

Mandatory minimum sentences are adopted by Parliament to restrict court discretion when deciding on a punishment for an offence. However, these decisions by the Supreme Court raise questions about the future of mandatory minimum sentencing in Canada.

Section 12 of the *Charter* states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." This section is usually used to challenge mandatory minimum sentences; the court will then determine whether the sentence is a grossly disproportionate punishment given the facts of the case or based on reasonable hypothetical circumstances.

In *Charboneau*, Justice Ackerl mentioned that the accused interacted with a young female teenager who was alone at the park. His behaviour was both opportunistic and deliberate as he knew that she was 14 years old. He started a sexual conversation and asked her about 10 times to leave with him for what was "inferentially, but undoubtedly, sexual activity for money" (at para 19). Justice Ackerl added that the fact that the accused stated, before leaving, that he would be thinking of her and asking if she would do the same, "carried a sexual undertone" (at para 19). Further, "The accused's behaviour was not only persistent but increasingly demanding in intensity and sexuality… [and] his conduct invited the troubling spectre of ongoing sexual interest" (at para 20).

The sentence must be proportional to both the circumstances of the offence and the offender according to Justice Ackerl, citing *R v Hajar*, 2016 ABCA 222 (CanLII) at para 136:

> [P]roportionality is the only governing sentencing principle ... Thus, in the end, the sentence imposed on an offender, after taking into account all relevant sentencing principles, objectives, factors and circumstances, must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In other words, individualization and parity principles inform, but do not temper, much less trump, proportionality. (*Charboneau* at para 30)

Justice Ackerl added that:

> sentencings for this offence can vary from a suspended sentence to a one year jail term. That shows the diverse factual circumstances that can arise for this offence. It also reflects the date upon which the decisions were issued. They are of limited utility in addressing parity of sentence. (at para 42)

Aggravating Factors

The accused was age 34, and the complainant was age 14 when the offence took place. He was a mature adult, while she was an early-age teenager. Justice Ackerl noted: "This vast age gulf, especially given their life stations, is an aggravating sentence factor" (at para 44).

During their conversation, the accused tried to exploit the complainant by using different and repeated, aggressive tactics. Justice Ackerl stated: "In implicitly suggesting future sexual interest, the impact of his conduct lingered. This persistent escalating and varied conduct is an aggravating sentence factor … These circumstances elevate the already high moral blameworthiness attached to commission of this specific intent offence" (at para 45).

According to the complainant's Victim Impact Statement, the offence caused her physical, psychological and emotional health problems. Counselling had helped but it did not completely remove the offence's impact. Justice Ackerl noted that the complainant had lost confidence in her world which constitutes a statutory aggravating sentence factor (at para 46; see also para 88 where the court notes that ss 718.01 and 718.2(a)(ii.1) of the *Criminal Code* make abuse of a person under the age of 18 years an aggravating factor).

Mitigating Factors

Defence counsel claimed that the accused's employment situation was under consideration as a result of these sexual offence convictions. The defence argued that these "collateral consequences" of a conviction should be a mitigating sentence factor. Justice Ackerl disagreed (at para 47). He cited *R v Pham*, 2013 SCC 15 (CanLII), [2013] 1 SCR 739 at para 11, where the Supreme Court defined collateral consequences:

> [T]he collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as

> personal circumstances of the offender. However, they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender (s. 718.2(*a*) of the *Criminal Code*). Their relevance flows from the application of the principles of individualization and parity. The relevance of collateral consequences may also flow from the sentencing objective of assisting in rehabilitating offenders (s. 718(*d*) of the *Criminal Code*). Thus, when two possible sentences are both appropriate as regards the gravity of the offence and the responsibility of the offenders, the most suitable one may be the one that better contributes to the offender's rehabilitation. (*Charboneau* at para 48)

Justice Ackerl also cited *R v Suter*, 2018 SCC 34 (CanLII), where the Supreme Court examined the impact of collateral consequences for sentencing purposes and ruled they should have been considered to a limited extent. In *R v Suter* (at para 47), the Court extended the definition of collateral consequences to include:

> any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender. (*Charboneau* at para 49)

Justice Ackerl held that it was normal to presume that sexual offence convictions involving a minor would have serious employment impacts for any accused regardless of their occupation or employment history. In this case, it was uncertain what the resulting impact of the conviction on Mr. Charboneau's employment would be (at para 50).

Justice Ackerl found that the collateral consequences of this case did not appropriately constitute a mitigating sentence factor (at para 51). He ruled that a proportional sentence for this offence and for Mr. Charboneau was a jail term of nine months with a probation term of approximately two years. This decision was made without taking into account the mandatory minimum six month sentence in s 286.1(2)(a) of the *Criminal Code* (at para 52).

Section 12 of the Charter

According to *Nur* and *Lloyd*, a law violates s 12 if its "reasonably foreseeable applications" would impose grossly disproportionate sentences on offenders not currently before the court (*Lloyd* at para 22, cited in *Charboneau* at para 54). The court must examine reasonable hypothetical situations where the mandatory minimum sentence would apply (at para 54).

Justice Ackerl asserted that courts can look into the offender's age when examining reasonably foreseeable applications of the law. Courts have done so in previous cases dealing with children and young persons accused of sexual offences (at para 60).

The accused argued that the reasonably foreseeable future application of the mandatory minimum six month sentence could impose cruel and unusual punishments on other offenders. He gave the following hypotheticals:

1. Paying a person under the age of 18 for a kiss;

2. A naïve 18-year-old communicating with a more sophisticated 17-year old where the younger individual quickly rebuffs the advances and no further conduct arises;

3. An individual who becomes nervous and abandons their attempt to obtain sexual service after having already sincerely communicated the offer. (at para 74)

Justice Ackerl applied the second reasonable hypothetical to determine the unconstitutional application of the mandatory minimum sentence. He did not find hypotheticals 1 and 3 useful in assessing the constitutionality of s 286.1(2).

According to *Lloyd* (at para 23), the first step in analyzing whether a mandatory minimum sentence violates s 12 is to assess a fit and proportionate sentence for the reasonable hypothetical case. In hypothetical #2, Justice Ackerl found that the parties' respective age differential did not constitute an aggravating factor (at para 88). A suitable sentence would fluctuate from a conditional discharge to a suspended sentence and a probation period, taking into account the offender's youth, their lack of criminal history and the minor facts of the offence, "arising from, and ending with, a single isolated request" (at para 90). Justice Ackerl stated that his suggested applicable sentence range "can achieve adequate denunciation and deterrence, recognize rehabilitation prospects and respect the sentence principles in ss 718.2(d)-(e) of the *Criminal Code*" (at para 90). Imprisonment for six months would surpass the range of proportionate sentences in hypothetical #2. Justice Ackerl thus found that the reasonably foreseeable application of the mandatory minimum six month sentence in s 286.1(2) would yield excessive punishment in some cases. However, he noted: "to run afoul of s 12, a mandatory minimum sentence must be more than merely excessive; it must be grossly disproportionate to the fit and proportionate sentence" (at para 91).

Justice Ackerl argued that in hypothetical #2, the offender and victim are both young and close in age. There is no power imbalance and the victim "is not an exploited person involved in the child/youth sex trade" (at para 97). He added that "in such cases, the form or, at the very least, degree of exploitative conduct a mandatory minimum sentence is meant to denounce and deter does not arise" (at para 97). These cases "can become a hardship when an accused person falls into the category of not being contemplated by the drafters of the legislation" (*R v Badali*, 2016 ONSC 788 (CanLII) para 62, quoted in *Charboneau* at para 97).

Justice Ackerl also considered the degree of moral blameworthiness, noting that "An 18-year-old who once offers to pay his 17-year-old peer for a sexual service such as "flashing," (knowing her age) is less morally blameworthy than a mature adult" (at para 99).

Justice Ackerl decided that although the mandatory minimum sentence in s 286.1(2) has a valid penal purpose – namely, preventing the sexual exploitation of children and youth by adults – this purpose was weakened in hypothetical #2 (at para 100). He noted that a six-month jail sentence is "a substantial interference with individual liberty" (at para 101). Moreover, "for the 18-year-old with no prior criminal record, it is a harsh and punitive sentence. It carries the potential of significant deleterious effects on the youthful offender's relationships, education, and career prospects at an important juncture between adolescence and adulthood. There is a very real

possibility of negative impacts on the 18-year-old offender's development into a pro-social, contributing member of society" (at para 101).

Justice Ackerl concluded that a minimum six month sentence for the offence in hypothetical #2 is "so excessive as to outrage standards of decency" (at para 106). For that reason, this minimum sentence was grossly disproportionate, leading to cruel and unusual punishment that violates s 12 of the *Charter* (at para 106).

Commentary

In its 1987 report, the Canadian Sentencing Commission suggested that all mandatory minimum sentences should be overturned, with the exception of the most atrocious crimes like murder and high treason.

Following this perspective, many Canadian courts, including the Supreme Court, have struck down mandatory minimum sentences for violating s 12 of the *Charter* in circumstances that would constitute cruel and unusual treatment in reasonable hypothetical cases.

R v Charboneau offers an important point of view on how the trial courts in Alberta will consider future cases regarding the mandatory minimum sentences adopted by Parliament. Declaring a mandatory minimum sentence unconstitutional by the Court of Queen's Bench in Alberta, means trial courts in this province will be bound by this decision in other cases involving the same offence. Trial courts will have to take into consideration the offender's situation and the offence in order to determine what sentence is suitable without being bound to impose the mandatory minimum six month sentence according to s 286.1(2)(a) of the *Criminal Code*.

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