CITATION: R. v. Tinker, Judge, Bondoc & Mead, 2015 ONSC 2284
COBOURG COURT FILE NO.: 74/14
DATE: 2015-04-09

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN Appellant	B.J. Kelneck, for the Appellant
– and –	
EDWARD TINKER, KELLY JUDGE, MICHAEL BONDOC, and WESLEY MEAD Respondents	A.Black, M. Howatt & T. LeRoy, for the Respondents
	HEARD: January 29, 2015

JUSTICE B. GLASS

Crown appeal of Trial Judge's Ruling to a s. 7 Charter Constitutional Question About the Validity of s. 737 of the Criminal Code of Canada (Victim Surcharge)

[1] The Respondents were charged separately for various charges pursuant to the Criminal Code of Canada. The trial judge raised the constitutional question about the validity of the Victim Surcharge provisions of the Code.

[2] Each Defendant entered guilty pleas at different days.

[3] Edward Tinker pled guilty on February 5, 2014 to one count of uttering threats pursuant to s. 264.1 and one count of breach of probation contrary to s. 733.1 of the Criminal Code. Four days credit for pre-trial custody together with a sentence of 26 days to be served intermittently followed by probation for two years. A s. 110 firearms prohibition order for ten years and a DNA databank order were included in the sentencing order. The issue of victim surcharges was reserved for further argument.

[4] Mr. Tinker was 55 years of age and had a Canada Pension Plan and Workers' Compensation income of $1200 a month income. He had no savings. His rent was $950 per month. Medication costs were $80 per month. The Defendant had $170 per month to pay for food, clothing, utilities and incidentals.

[5] Kelly Judge entered pleas of guilty to assault contrary to s. 266of the Criminal Code and one count of uttering threats contrary to s. 264.1 of the Criminal Code. She received 2 days credit for pre-trial custody and was sentenced concurrently on both charges to a suspended sentence and 18 months probation, a s. 110 firearms prohibition order for 5 years and a DNA databank order. The victim surcharge issue was reserved for argument.

[6] Ms. Kelly was 51 years old and legally blind, a recovering alcoholic confronted with depression and bi-polar disorder. Her monthly income was $831 from Canada Pension Plan Disability. She owned a farm with her estranged husband who was the complainant in the matter that brought her to court. Her probation order does not permit her to communicate with or reside with her husband. Her rent was $800 per month. She had $31 per month plus her savings of $2,000 for any other expense.

[7] Michael Bondoc pleaded guilty to two counts of breach of probation contrary to s. 733.1(1) of the Criminal Code. Justice Beninger allowed Mr. Bondoc credit for 27 days of pre-trial custody and sentenced him to another 33 days in custody for each charge concurrently. The trial judge reserved on the victim surcharge issue for argument.

[8] Mr. Bondoc was 24 years old at the sentence hearing date. He had been laid off from a factory job at the time of his sentence hearing.

[9] Wesley James Mead pleaded guilty to one count of possession of a weapon for a purpose dangerous to the public peace contrary to s. 88 of the Criminal Code, one count of assault contrary to s. 266 of the Criminal Code, one count of assault resisting arrest contrary to s. 270(1) (b) of the Criminal Code. Justice Beninger allowed 15 days credit for pre-trial custody and sentenced Mr. Meade to a suspended sentence and probation for a period of 18 months, a s. 110 firearms prohibition for 5 years and a DNA databank order. With this case, the Defendant asked for 90 days to pay the victim surcharge, but the trial judge noted that he was limited to allowing 30 days to pay the victim surcharge. With that situation arising, Justice Beninger reserved his decision on the victim surcharge so that this Defendant could present argument as well. Time to pay is legislated in s. 737 of the Criminal Code to be the time fixed by the lieutenant governor in council. In Ontario, the time is fixed for 30 days for summary conviction matters and 60 days for matters handled by way of indictment; however, there is provision for extending that time.

[10] Mr. Meade was 46 years old at the sentence hearing date. He experienced mental health issues and supported his spouse and child through Ontario Disability Support Plan Benefits. He asked for time to pay the victim surcharge. His wife had stated that they did not have any money.

[11] The Crown proceeded by way of summary conviction for all charges for the Defendants.

[12] With each Defendant the issue of imposing a mandatory minimum victim surcharge was addressed by the trial judge who found that s. 7 of the Charter of Rights and Freedoms was contravened. S. 12 of the Charter had been on the table, but the trial judge ruled that there was no need to rule on that s. because he had ruled on s. 7.

[13] Each of the Defendants was a person of limited financial resources. The bottom line is that they do not have excess funds. One might reasonably anticipate that they would have to request extensions of time to pay victim surcharges even though the minimum here would be $100 for each of the offences.

[14] The issue that was argued on this Crown appeal is whether the victim surcharge is in breach of s. 7 of the Charter of Rights and Freedoms. There had been an issue whether s. 12 was infringed, but that was not argued on the appeal. The trial judge had not ruled on s. 12 because he had found that the victim surcharge provision of the Criminal Code breached the s. 7 rights of the Defendants and therefore there was no need to rule on s. 12.

Issues

[15] Was the victim surcharge in the nature of a fine?

[16] If not, what is a surcharge?

[17] If a surcharge is not a fine, is it a punishment or sanction for criminal behaviour?

[18] If there is a s. 7 Charter breach, what is the remedy?

[19] Although s. 1 had been raised, at the appeal the Crown advised that it was not relying on s. of the Charter.

Position of the Crown / Appellants

[20] The Crown argues that the victim surcharge is not a fine, a punishment, a tax or a form of restitution. It is a consequence of the conviction.

[21] Since the surcharge is not a form of sanction, it cannot be considered to be an imposition of hardship upon people thereby depriving them of their life, liberty and security.

[22] The trial judge was in error treating the surcharge as a penalty with a grouping of sanctions for criminal misbehaviour.

Position of the Defendants / Respondents

[23] Ms. Black, Ms. Howatt and Mr. LeRoy for the Defendants, in a short descriptor, basically say that a victim surcharge is to all intents and purposes a form of punishment akin to a fine. It might not be called a fine. It might not be restitution. But when all is said and done, a victim surcharge flows from a criminal conviction so that it is part of an overall sanction package for breaking the law.

[24] The Defence submits that regardless of calling a victim surcharge a fine or a penalty, it imposes a hardship upon the Defendants of disproportionate levels because they are people of little financial resources who are virtually at risk of become inhabitants of a debtors’

prison. When a sanction goes to that extent, it breaches s. 7 of the Charter by infringing upon the life, liberty and security of people.

Analysis

[25] If a person breaks any criminal law in Canada, the individual will be subject to a victim surcharge which might range from 30% of any fine imposed or if no fine is created, then subject to a surcharge of $100 for each charge proceeded by way of summary conviction or $200 for each charge proceeded by way of indictment.

[26] S. 737(4) of the Criminal Code provides that any time to pay a surcharge is established by the province in which the Defendant lives. In Ontario, there is an order in council providing that a person is allowed 30 days to pay a surcharge for a summary conviction matter and 60 days for an indictable matter. That is covered by order in council 2173-99 for Ontario.

[27] S. 737 (8) (d) of the Criminal Code provides that a person subject to a victim surcharge may apply for a change in terms for the surcharge to address being in default of paying by a given date.

[28] Mr. Kelneck has stated that the Crown will consent to an extension of time for payment of the surcharges for 2 years.

Is a Victim Surcharge a Fine, Punishment or Criminal Sanction?

[29] I do not read a surcharge to be a fine. It is not in the form of a penalty. It flows from a conviction for a crime, but it is not a sanction in its own right. Rather, it is quite simply what the Crown has described it to be, which is a sum of money established to be a consequence of breaking the law. That is different from a sanction because is it not in the same category as a fine, a tax, or a penalty. Rather, the surcharge is a sum of money that goes into a pool of resources to help victims of crime. Just as there are requirements for providing DNA samples upon conviction of offences and they are not sanctions, so do victim surcharges become requirements without being penalties.

Is a Victim Surcharge a Grossly Disproportionate Imposition?

[30] The Defendants submit that whether surcharges are sanctions or penalties or another form of required results flowing from conviction does not matter because however one might cut the cheese, the end result is grossly disproportionate for the individuals and should not be enforced. I disagree with this point.

[31] The Defendants go to the extent of saying that one should apply gross disproportionality to everyone when analyzing minimum victim surcharges. For example, minimum gun penalties have been found to be over the top of acceptance in Canada as in R. v. Nur, 2013 ONCA 677 and therefore a grossly disproportionate punishment. The Ontario Court of Appeal there determined that a method of assessing the appropriate sentence for such an offence must be exercised basically on a case by case basis rather than a generalized one

minimum sanction fits all. This amounts to loading up the sanction arbitrarily and excessively. At the end of the day, the Ontario Court of Appeal in Nur determined that a minimum custodial sentence for possession of a loaded prohibited firearm under s. 95 of the Criminal Code was excessive. That is where such a criminal sanction was found to be grossly disproportionate.

[32] In Nur, Doherty J.A. analyzed first whether the law in question is grossly disproportionate to the accused person before the court and secondly whether the sentence is grossly disproportionate when it is applied to reasonable hypotheticals. He considered in paragraph 78 these factors:

- the gravity of the offence;
- the personal characteristics of the offender;
- the particular circumstances of the case;
- the actual effect of the punishment on the individual;
- the penological goals and sentencing principles reflected in the challenged minimum;
- the existence of valid effective alternatives to the mandatory minimum; and
- a comparison of punishments imposed for similar cases.

[33] The case before me is a far cry from being grossly disproportionate for the persons involved and further when applied to reasonable hypotheticals. With each Defendant, the conviction is made on summary conviction leading to a consideration of a surcharge of $100 each. The persons involved are not well-to-do persons. They have an economic life style that is very humble. However, there is a means of granting them significant time to pay the surcharges. The Crown has indicated a willingness to allow 2 years for payment. I might add that if there were some of the surcharges still outstanding at the end of 2 years, the person could apply for another extension. The same reasoning for the individual Defendants would apply to others in general in our society. I shall set out further analysis below.

Is the Victim Surcharge in Breach of s. 7 of the Charter?

[34] Justice Beninger noted that in Canada (Attorney General) v. Bedford, 2013 SCC 72 at paragraph 96, McLachlin C.J.C. emphasized that a s. 7 analysis focuses on inherently bad laws, meaning laws that remove life, liberty, or security of people in ways that run over basic values of people in Canada. She added that the principles of fundamental justice are an attempt to capture those values. Then, at paragraph 123, the Chief Justice wrote that the s. 7 question is whether anyone’s life, liberty or security of the person has been denied by a law that is inherently bad. A law that has a grossly disproportionate, overbroad or arbitrary impact on one’s person will be sufficient to establish a breach of s. 7.

[35] The victim surcharge set out in s. 737 of the Criminal Code of Canada does not fall into the category of bad law. As I state in these reasons, the surcharge is not grossly disproportionate. Nor is a surcharge too broad a sweep against persons. For the reasons that follow, the surcharge is valid legislation and is not contrary to s. 7 of the Charter.

[36] In R. v. Wu, 2003 SCC 73, the Supreme Court of Canada ruled that the trial judge should have imposed a minimum fine of $9600 as provided for a contraband cigarette case and then should have granted time to pay the minimum fine. If there continued to be payment less than full payment, the Crown might have to consider how far they might go with collection or simply not pursuing it any more. Further, if the financial resources of the person changed whereby the person might be able to pay, the individual could do so. The minimum fine worked out to $0.16 per cigarette. There were 300 cartons of contraband cigarettes.

[37] The Wu decision was not a Charter case, but it dealt with minimum fines, time to pay, and considerations of gross disproportionality.

[38] I think each of the Defendants here in the case before me is in a similar position to that of Wu.

[39] The trial judge in the case before me analyzed the case as one of grossly disproportionate criminal sanctions, but with the greatest of respect to the trial judge I find that his analysis is erroneous. The surcharge cannot be considered to be a fine-like sanction in the quiver of criminal sanction arrows because it only flows from the actions of the Defendants in a similar way to a DNA order. It is not in the form of punishment as one might sentence a person.

[40] I would reach the same conclusion taking the suggestion of the Defence that it does not matter whether or not a surcharge is a punishment like a fine because the imposition of a surcharge is not grossly disproportionate. Under s. 737, all calculations of a surcharge, be it following a fine or as a minimum when no fine is imposed, are not grossly disproportionate on their face. If a fine was imposed and 30% of that figure was calculated as a surcharge, it would be appropriate if the person apparently had the financial means to pay. If the individual was not well-resourced financially to do so, the quantum would be a ground of appeal of the amount of the fine which would then affect the surcharge calculation. If the appeal determined that there ought not to have been a fine, then the non-fine minimum would be present for the appeal court to impose. If the minimum figure were used, I do not find that $100 per charge for summary conviction matters or $200 per charge for indictable matters is grossly disproportionate. With a time to pay ability under s. 737 (8) (d) of the Criminal Code, a Defendant of modest means can pay small amounts at a time or save small amounts to pay in one or more than one payment. In the case before me, with 2 years allowance to pay the surcharge sums, three Defendants have 2 charges each and one has 3 charges. At 3 charges with $300 in surcharge calculations, the person would be paying $2.88 per week. At 2 charges in such calculations, the person would be paying $1.92 per week. Even a person of very modest means can achieve such payments.

[41] If a person does not choose to set aside money or pay in instalments when given very reasonable time to pay, the individual becomes the author of their own misfortune when they come to the end of the period given to pay the surcharge.

[42] From that perspective, this is not grossly disproportionate for any of the 4 Defendants in the case before me nor for anyone in general.

Conclusion

[43] The minimum victim surcharge is not a fine or criminal punishment.

[44] Even if the surcharge were a form of criminal punishment, it is not grossly disproportionate to the Defendants involved nor is it grossly disproportionate for anyone facing such a surcharge.

[45] The victim surcharge in s. 737 of the Criminal Code of Canada is determined to be valid. It is not in contravention of s. 7 of the Charter.

[46] The victim surcharge will be imposed for each of the 4 Defendants in the sum of $100 per charge. Each Defendant is granted 2 years to pay the surcharge for each charge concurrent to each other. That means that each has 2 years to pay. If they have not completed payment within the 2 years, they still have an opportunity to apply for additional time to pay what is left owing. I use the 2 year period for payment taking into account that the Crown on the appeal advised that the Crown would consent to a 2 year period to pay the victim surcharges.

[47] This means that Mr. Tinker will have a victim surcharge of $100 on each of 2 charges for a total of $200.

[48] Ms. Judge will have a victim surcharge of $100 on each of 2 charges for a total of $200.

[49] Mr. Bondoc will have a victim surcharge of $100 on each of 2 charges for a total of $200.

[50] Mr. Meade will have a victim surcharge of $100 on each of 3 charges for a total of $300.

[51] There is a form (CSO-734-1) pursuant to s. 737.8 of the Criminal Code of Canada that sets out the amount of the surcharges and the time for payment. That form will be completed by the court office of the Ontario Court of Justice in Cobourg and provided to counsel for the Defendants.

[52] Because the court office will require time to complete the document and to send it to counsel for each Defendant, the commencement of the time to pay the victim surcharge will be 30 days from today.

[53] The amount of the victim surcharge was not in dispute. The Crown expressed consent to an allowance of 2 years to pay the surcharges. Therefore, there is no need to remit the file back to the trial judge for a determination of the surcharges.

Justice B. Glass

Released: April 9, 2015