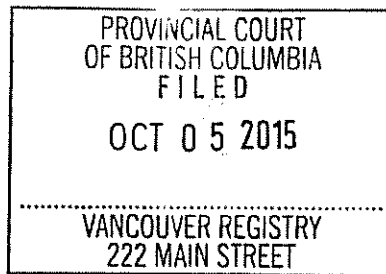


Citation: ☼



Date: ☼
File No: 13676-5-A
Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
Criminal Division

REGINA

v.

BRUCE STEWART BARINECUTT

**SECTION 1 RULING
OF THE
HONOURABLE JUDGE**

Counsel for the Crown:

T. Shaw

Counsel for Defence:

D. Fai

Place of Hearing:

Vancouver, B.C.

Date of Hearing:

August 7, 2015

Date of Judgment:

October 5, 2015

[1] Mr. Barinecutt has brought a challenge under the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) to the constitutionality of the victim surcharge. Earlier, I found that the victim surcharge infringed Mr. Barinecutt’s s. 7 and s. 12 *Charter* rights: *R. v. Barinecutt*, 2015 BCPC 0189 (the “*Reasons*”). This is my ruling on whether the infringement is justified under s. 1 of the *Charter*.

[2] Section 1 of the *Charter* states:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

For an infringement to be justified under s. 1 of the *Charter* the Crown must show, on a balance of probabilities, that

“...the law has a pressing and substantial objective and that the means chosen are proportional to that objective. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law...”: *R. v. Nur*, 2015 SCC 15 para 111

see also *R. v. Oakes*, [1986] 1 S.C.R. 103; *Sauve v. Canada (Chief Electoral Officer)*, 2002 SCC 68; *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 para 137.

[3] The inquiry is fact-specific and contextual: *RJR v. Canada*, para 132-134. The degree of deference to Parliament may be affected by the situation which the law is attempting to redress: *RJR v. Canada* para 135; *Alberta v Hutterian Brethren*, paras 87, 91.

OBJECTIVE OF THE LAW

[4] The objective of the victim surcharge is to make offenders accountable to victims and to generate revenue for victim services: *Reasons*, para. 38.

[5] It would be difficult to argue with the objective of a law that purports to make offenders accountable to victims. Promoting a sense of responsibility in offenders is one of the sentencing principles in s. 718 of the *Criminal Code*, R.S.C. 1985 c. C-46.

Likewise, generating revenue for victim services is a laudable goal, benefiting a variety of services to victims (Taryn Walsh Affidavit, sworn July 15, 2014) and an increasing number of recipients. According to *Juristat*, a Statistics Canada publication, the number of victims assisted increased from 4,358 in 2002/2003 to 10,664 in 2011/2012. I find that the Crown has established a sufficiently important objective.

PROPORTIONALITY

[6] Although a majority of the Supreme Court of Canada has never upheld a violation of s. 7 through s. 1 (*R. v. Boutilier* 2015 BCSC 901 at para 35 and 36), s. 7 and s. 1 ask different questions: *Bedford v. Canada (A.G.)* [2013] 3 S.C.R. 1101. In continuing to the second phase of the s. 1 analysis (the question of reasonableness and demonstrable justification), I must consider proportionality of the law in furthering the public interest as against any negative impact on the rights of individuals, and not whether the law is in accordance with the principles of fundamental justice: *Bedford v. Canada (A.G.)* [2013] S.C.R. 1101, para 124, 125. A legislative scheme need not be discretionary to be justifiable: *Alberta v. Hutterian Brethren of Wilson County* [2009] 2 S.C.R. 567.

Rational Connection

[7] Is the victim surcharge rationally connected to its objective - is it either arbitrary, unfair or based on irrational considerations?

[8] In the course of sentencing an offender, before imposing a fine or ordering restitution an enquiry is typically made into the offender's ability to satisfy the punishment or order. A victim surcharge is a mandatory provision and hence no enquiry is made. If an offender has no ability to pay the surcharge, it is difficult to envision how it could promote accountability, let alone raise funds for victim services. Rather, it is likely to promote frustration and resentment on the part of impecunious offenders as collection of the surcharge is pursued (including attachment of any GST rebate to which the offender may be entitled).

[9] It is irrational to impose a mandatory payment on an individual with no prospect of payment, for whom attachment of government benefits would create a hardship, and where a government administration would expend time, effort and monies in an attempt to collect such mandatory payment. Further, the costs of these collection efforts would likely far exceed the monies sought to be collected.

[10] Therefore, as in this case, the victim surcharge is not rationally connected to either its objective of promoting accountability in offenders, nor increasing funds for victim services. In the event that I am wrong in this conclusion, I will consider other aspect of the s. 1 test.

Minimal Impairment

[11] As regards an impecunious offender, the Crown argues that once a victim surcharge is imposed, the offender may be able to raise the unfair impact of the surcharge on them with the administration responsible for collecting the surcharge. Moreover, it should be presumed that future decision makers will be governed by the *Charter* and will exercise their discretion in keeping with the *Charter*, therefore justifying the legislation: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R. 1120. What the Court found in *Little Sisters v. Canada* was a failure of proper procedures at the implementation level which could therefore be addressed at that level.

[12] Here, we are not dealing with failure at an implementation level which can be remedied at that level, but with a mandatory punishment, which an administrative arm of government is delegated to enforce. The presumption of *Charter*-compliant exercise of power in good faith by a government agent cannot replace an independent Court's decision on the *Charter*. *R. v. Nur*, para 85 and 86.

[13] The Crown argues that with regards to the unavailability of a record suspension if a victim surcharge remains unpaid, decisions to deny a record suspension are reviewable: *Tanner v. Canada (Attorney-General)* 2003 FCT 268, affirmed 2004 FCA 7. That case, however, concerned an offender who was eligible to apply for a pardon. There the Court found no evidentiary basis for the denial of a pardon. It was not dealing with a circumstance where the offender had not met all of the statutory criteria required for a record suspension. Those criteria include payment of any fine (which includes the

victim surcharge: *Criminal Code* s. 716, 737; *Criminal Records Act* R.S.C. 1985 c. C-47; *Record Suspension Application Guide*, Parole Board of Canada).

[14] I do not find that discretionary administrative collection measures suffice to demonstrate minimal impairment of Mr. Barinecutt's s. 7 and 12 *Charter* rights. Parliament could have achieved its objective by setting out criteria for the waiver or imposition of a victim surcharge. The government has not shown an absence of less drastic measures available to achieve their objective (*Alberta v. Hutterain Brethren*, para 55). Accordingly, the infringement on Mr. Barinecutt's *Charter* rights cannot be seen as engaging a minimal impairment reasonably necessary to achieve the state's legitimate objective: *R. v. Nur*, para 116.

Proportionality

[15] Here, the mandatory nature of the victim surcharge has a grossly disproportionate impact on numerous classes of disadvantaged offenders, and so the impact of the law on protected rights outweighs the beneficial effect of the law considering the greater public good. It is unfair to offenders who, as a result of a number and variety of individual, social and systemic reasons, have no ability to pay, nor any future prospect of an ability to pay.

CONCLUSION

[16] The victim surcharge violates Mr. Barinecutt's s. 7 and s. 12 *Charter* rights and those violations are not justified under s. 1.

[17] I do not have jurisdiction to grant declaratory relief pursuant to the *Charter*: *R. v. Lloyd* 2014 BCCA 224. However, the law in that regard is not clear-cut, see *R. v. Big M Drug Mart* [1985] 1 S.C.R.295, and *R. v. Nur*, and the ambiguity remains to be resolved. Against that background, it appears I can go no further than rule that the victim surcharge will not be imposed on Mr. Barinecutt in respect of these offences, and I so rule.



The Honourable Judge D. Senni
Provincial Court of British Columbia