

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

TONY HOWARD KAKFWI

MEMORANDUM OF JUDGMENT
(APPLICATION FOR DECLARATORY RELIEF)

I) INTRODUCTION AND BACKGROUND

[1] Tony Kakfwi seeks a declaration that all victim of crime surcharges imposed pursuant to section 737 of the *Criminal Code* between October 24, 2013 and December 14, 2018 are void and without effect.

[2] The requirement for courts to impose a surcharge at the time of sentencing was first introduced into the *Criminal Code* in 1988. Surcharge monies went to funds set up in each Province and Territory to provide assistance to victims of crime. It was up to provincial and territorial governments to direct how these funds would operate.

[3] Between 1988 and 2013, a sentencing judge had the discretion not to impose the surcharge if the judge was satisfied that doing so would result in undue hardship for the offender or the offender's dependents. On October 24, 2013, Parliament amended the provision and made the imposition of surcharges mandatory: from that point on, sentencing courts no longer had any discretion to refrain from imposing the surcharge, irrespective of hardship.

[4] On May 1, 2018, this Court sentenced Mr. Kakfwi for three indictable offenses. Mr. Kakfwi was, as part of his sentencing, ordered to pay a surcharge of \$200.00 for each charge.

[5] On December 14, 2018, the Supreme Court of Canada declared that section 737 contravenes section 12 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). It declared section 737 to be of no force and effect. *R v Boudreault*, 2018 SCC 58.

[6] On February 18, 2019, Mr. Kakfwi, without the assistance of counsel, filed a request to serve the default time associated with his surcharges, pursuant to section 734.3 of the *Criminal Code*. I directed that the matter be spoken to in court and that counsel who had represented Mr. Kakfwi at his sentencing hearing be made aware of the situation.

[7] The hearing proceeded on April 30, 2019. Counsel appeared and made submissions. He sought relief for the benefit of Mr. Kakfwi and declaratory relief for the benefit of other offenders.

[8] For Mr. Kakfwi himself, the order sought was a declaration that the surcharges imposed at his sentencing hearing are of no force and effect. The Crown did not oppose this aspect of the application. This remedy was granted at the conclusion of the hearing.

[9] In addition, Mr. Kakfwi sought a declaration that any and all unpaid surcharges imposed between October 24, 2013 and December 14, 2018 are contrary to section 12 of the *Charter* and unenforceable by any means. The Crown opposed this aspect of the application.

[10] For the reasons that follow, I have concluded that the application for declaratory relief should be dismissed.

II) ANALYSIS

1. Scope of declaratory relief

[11] This Court's power to grant declaratory relief is not disputed. Nor is the legal framework that governs the exercise of that power. That framework was recently reiterated by the Supreme Court of Canada:

A declaration is a narrow remedy but one that is available without cause of action and whether or not any consequential relief is available (...) A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the

issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought. (citations omitted)

Ewert v Canada [2018] 2 S.C.R. 165, para. 81.

[12] The Crown argues that here, the dispute is theoretical because the Public Prosecution Service of Canada (PPSC), as a matter of national policy, is not seeking enforcement of surcharges imposed between October 24 2013 and December 18, 2018.

[13] I disagree. The issue that arises with respect to the validity and enforceability of pending surcharges is not rendered theoretical by the federal prosecution agency's current policy. Persons who have pending surcharges may well pay them. Or, unaware of *Boudreault* and its implications, they may seek to serve the default time instead of paying the surcharge, as Mr. Kakfwi originally did.

[14] Moreover, nothing would prevent the PPSC from changing its policy about enforcement. In addition, having an unpaid surcharge may have consequences for an offender aside from those stemming from enforcement by the prosecuting agency. As noted in *Boudreault*, it may result in an offender not being able to seek a record suspension pursuant to the *Criminal Records Act*, R.S.C. 1985, c. C-47. *Boudreault*, paras 78 and 106.

[15] I conclude, therefore, that the dispute is not theoretical. I also find that the other criteria outlined in *Ewert* are met. However, that does not end matters because declaratory relief is a discretionary remedy. The fact that the criteria are met does not mean that the Court should grant declaratory relief.

2. Whether declaratory relief is warranted in this case

[16] In *Boudreault*, the Supreme Court of Canada acknowledged that striking down section 737 as unconstitutional "would be of little help to individuals already subject to surcharge amounts that they cannot pay". *Boudreault*, para. 104. It recognized that declarations of invalidity generally only have a prospective effect on non-parties and that court orders are protected by the doctrine of *res judicata* even when the legislation on which they are based is later invalidated. *Boudreault*, para.105.

[17] However, the Court went on to say that "the rule of law will not suffer the continued infliction of cruel and unusual punishment that cannot be justified in a free and democratic society" and that "the mandatory victim surcharge violates s.12 when it is imposed and when it is enforced". *Boudreault*, para.106.

[18] The Supreme Court recognized the challenge in identifying the remedy available to those who might be subject to such an ongoing violation of their s.12 *Charter* rights. It declined to order any such remedy but mentioned a number of possibilities:

Though unable to order a specific remedy for this class of offenders, I would note that a variety of possible remedies exist. Private parties may be able to seek relief in the courts, notably by recourse to s. 24(1) of the *Charter*. Government and Parliament also have options to attend to their responsibilities to ensure that Charter rights are protected. The government could proceed administratively, while Parliament may act to bring a modified and *Charter*-compliant version of s.737 back into the Code and to resolve the outstanding *Charter* concerns identified here.

Boudreault, para.109

[19] Since the release of *Boudreault*, some of these possibilities have come to pass. Some offenders subject to surcharges have obtained individual relief in the courts. *R v Brittany Napayok*, 2019 NWTTC 03; *R v Milne*, 2019 ONCJ 116.

[20] In addition, the PPSC's decision not to seek enforcement of existing surcharges is a form of administrative measure that the Supreme Court may have contemplated governments would implement in the aftermath of its decision.

[21] Other things contemplated by the Supreme Court have not happened. Parliament has not brought a new version of section 737 into the *Criminal Code*, nor has it taken any legislative steps to address unpaid surcharges.

[22] Mr. Kakfwi argues that in the absence of any intervention by Parliament, this Court ought to use its powers to prevent a continuation of *Charter* breaches arising from unpaid surcharges. In so doing he relies on the statement in *Boudreault* that mandatory surcharges "are cruel and unusual when they are imposed and when they are enforced".

[23] In response, the Crown argues that declaratory relief is unnecessary given the PPSC's policy not to seek enforcement of the surcharges that would be captured

by the declaration. It also notes that a declaration issued by this Court could potentially add layers of complexity for Parliament if it were to attempt to introduce a new, *Charter*-compliant version of section 737 in the *Criminal Code*. Finally the Crown argues that the declaration that Mr. Kakfwi seeks goes beyond the scope of the ruling in *Boudreault*.

[24] The first two arguments are unpersuasive. As noted above, while it is commendable that the PPSC has made a policy decision not to enforce these surcharges, ensuring that people are not subjected to a cruel and unusual punishment cannot be left to the discretion of prosecution agencies. If indeed the enforcement of all unpaid surcharges imposed during the relevant timeframe contravenes the *Charter*, courts have a responsibility to prevent such breaches.

[25] As for the possibility that a judicial pronouncement could complicate the drafting of legislation to introduce a modified version of section 737 in the *Criminal Code*, I do not find it is a sufficient reason for this Court to shirk its responsibilities to prevent ongoing *Charter* breaches.

[26] The real issue is whether the declaration that Mr. Kakfwi seeks is actually in line with what the Supreme Court of Canada said in *Boudreault*.

[27] As both counsel recognized during the hearing, the answer to this question does not emerge clearly from the decision. Some of the Court's comments suggest that giving retroactive effect to *Boudreault* would offend the principle of *res judicata*. Other things the Court said imply that courts should intervene to prevent enforcement of existing surcharges if such enforcement perpetuates a punishment that is cruel and unusual.

[28] As noted above at paragraph 16, the Supreme Court, in acknowledging that its ruling would not assist offenders already subject to surcharges, described them as “individuals already subject to surcharge amounts *that they cannot pay* and are attached to sentences they can no longer challenge”. *Boudreault*, para 104 (my emphasis). I take from this that for the enforcement of an existing surcharge to constitute an ongoing breach of the *Charter*, the offender who is subject to that surcharge must be unable to pay it.

[29] It could well be that some offenders have the means to pay the surcharge. For those offenders, although the surcharge was imposed pursuant to a provision that has now been declared unconstitutional, it does not necessarily follow that its enforcement constitutes a breach of section 12 of the *Charter*. I acknowledge that

practically, this will be the case for a very small numbers of the offenders sentenced in this Court, and possibly none. But the fact remains that the possibility exists.

[30] The declaration that Mr. Kakfwi seeks would capture all offenders who are subject to an unpaid surcharge. There would be no distinction between those who have the means to pay it and those who do not. That, in my view, exceeds the scope of the pronouncement in *Boudreault*.

[31] Practically speaking, Mr. Kakfwi is asking this Court to give *Boudreault* retroactive effect. To do so would be contrary to the general rule that declarations of invalidity only have prospective effect on non-parties and that court orders are protected from challenge by the doctrine of *res judicata*. *Boudreault*, paras 104-105. It is also something that the Supreme Court of Canada itself, seized with the issue, refrained from doing.

[32] I conclude that the declaration that Mr. Kakfwi seeks exceeds, in its effect, the scope of the pronouncement in *Boudreault*. For that reason, I am not prepared to grant that remedy. This aspect of Mr. Kakfwi's application is dismissed.

[33] However, it is imperative that unpaid surcharges imposed by this Court between October 24, 2013 and December 14, 2018 not be enforced without the Court having had an opportunity to decide whether they should be. During this timeframe, this Court was required to impose these surcharges without first inquiring into the offenders' ability to pay them. Given this, there is a very real potential for the enforcement of these surcharges to result in ongoing *Charter* breaches. This Court has a responsibility to ensure that this does not occur.

[34] I am also mindful that, as noted above, having an outstanding surcharge may have detrimental consequences for a person. Efforts must be made to ensure that persons who face these situations, and do not have the means to pay the surcharge, have a recourse.

[35] While I have decided against granting declaratory relief, I do find it necessary for this Court to take its own administrative steps to address these concerns.

[36] To this end, I direct the Clerk of the Court as follows, with respect to all unpaid surcharges imposed by this Court between October 24, 2013 and December 14, 2018:

1. If any offender attempts to pay the surcharge, registry staff shall refuse payment and place the matter on the next criminal chambers docket to be spoken to. The Crown and counsel who represented the offender at the sentencing hearing will be given notice of the date. Offenders will in all cases have leave to appear by phone if they cannot attend in person. This will give the Court an opportunity to entertain granting the same type of relief that was granted to Mr. Kakfwi in this matter.
2. If any offender makes application to serve the default time in lieu of paying the unpaid surcharge, or applies for an extension to pay that surcharge, registry staff shall schedule the matter to be spoken to on the next available Criminal Chambers date. Again, the Crown and counsel who represented the offender at the sentencing hearing will be given notice of the date and the offender will have leave to appear by phone if he or she cannot appear in person.
3. Any inquiry by any offender regarding an unpaid surcharge shall be brought to the attention of a judge of this Court so that a determination can be made as to whether the matter should be spoken to in court.

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
5th day of July 2019

Counsel for the Crown:	Brendan Green
Counsel for Tony Howard Kakfwi:	Charles Davison

S-1-CR-2017-000 022

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