

ORIGINAL

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

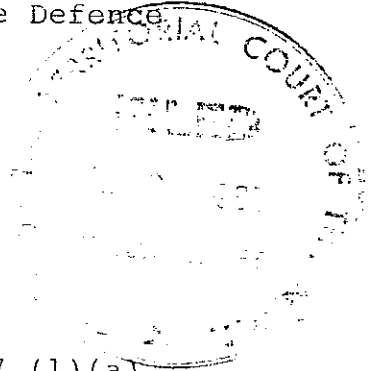
GLEN ROBERT WILCOX

Transcript of Submissions by Counsel, before His
Honour Chief Judge J. R. Slaven, sitting at
Yellowknife, in the Northwest Territories, on
Thursday, September 24th, A.D., 1987.

APPEARANCES:

MS. A. AITKEN: On behalf of the Crown

R. SPAULDING, ESQ.: On behalf of the Defence



(Charged under Sections 237(a), 387.(1)(a),
387.(3), and 387.(4))

THE COURT: These are for facts and sentence, are they?

MS. AITKEN: Yes, Your Honour.

Your Honour, I will deal firstly with the circumstances of the Section 295 offence on July the 11th.

Your Honour, on July 11th of this year at approximately 1:30 a.m., a 1977 Chrysler, which belonged to a Mr. Paul Fleury, was parked in front of Igloo Realty. The owner noticed the vehicle missing and reported it to the police. At approximately 1:54 a.m. the vehicle was involved in an accident in front of 21 Trails End.

THE COURT: I'm sorry. At what time?

MS. AITKEN: One fifty-four a.m. There were two male occupants in the vehicle who left the scene, and Glen Wilcox was identified by witnesses as being the driver of the vehicle that had been involved in the accident.

THE COURT: The accident, you mean, was a two car collision or a one car accident?

MS. AITKEN: May I just have a moment, Your Honour.

I don't have many details of it. I understand there were two cars involved and the one person stopped and asked the others to stay, which they said they would, and then he went away; and he came back and they were gone.

Your Honour, I don't have any estimate of damages for that accident, at all. Those are the circumstances on that charge, Your Honour.

MR. SPAULDING: Your Honour, those circumstances are admitted.

THE COURT: Thank you.

MS. AITKEN: Now, on the other informations, Your Honour, I understand there is a guilty plea to a Section 237 offence, a Section 295 offence, and two guilty pleas to Section 387.1(a).

THE COURT: I've got count 1, a 295, and counts 2 and 3 were 236's, and they're now 387's.

MS. AITKEN: That's correct, Your Honour. And then another information?

THE COURT: I only have two, I think. There's only two on the docket.

MS. AITKEN: Well, there should be another information before the Court. It was adjourned over.

MADAM CLERK: It was October 22nd, though.

THE COURT: Yes, I have a two count information here, a 238(5) and a 237(a), and it says there is a guilty plea to count 2 of 237(a).

MS. AITKEN: That's correct, Your Honour. That matter should have been on the docket on Tuesday and was to be on the docket today. There is another information that is not before the Court but had been put over to a later date for trial. But this matter is for sentencing.

THE COURT: Very good.

MS. AITKEN: Your Honour, I will speak to the 238(5) count after the facts have been read in.

THE COURT: Yes.

MS. AITKEN: Yes, Your Honour. I'll be reading in the circumstances for all counts, Your Honour, as it occurred at

one time.

On September 12th of this year, at approximately 6:00 a.m., Mr. Wilcox was in the area of the Franklin Trailer Park, here in Yellowknife. He was highly intoxicated at the time, and he managed to get a 1978 Subaru pick-up truck started and left the residence, with the vehicle, out onto Forrest Drive. Once on Forrest Drive, he turned left and travelled across the roadway and struck a boat/trailer combination that was legally parked in front of 5020 Forrest Drive.

Apparently, the impact of the vehicles pushed the boat across the trailer and did sufficient damage to the trailer to completely bend the axle of the trailer and crush one of the fenders.

From here, he drove alone in the truck and travelled towards Con Mines and he ended up in the School Draw area. Once on School Draw, he travelled south and slammed into the side of a 1987 Plymouth van, which caused the van, which was legally parked, to be moved up on the kerb and onto the boulevard area of a private residence. After striking the parked van, he travelled across the lawn of a residence on School Draw and back onto the travelled portion of the roadway, slamming into the kerb. As this occurred, the driver's front side wheel of the vehicle he was in was completely ripped off the truck and, at this point, the truck was now travelling on only three wheels of the vehicle.

Mr. Wilcox continued and was going towards the Great Slave Lake shoreline area; however, the vehicle dead-ended

and finally came to a rest in the bush area.

By this time, members of the R.C.M. Police had been called by private citizens who had heard or witnessed these incidents. The police patrolled to the area off 46th, off School Draw, and noted Mr. Wilcox. He was noted to be bloodied and coming from the stolen truck. Indications were that he was extremely intoxicated. He was arrested by the police and read the breathalyzer demand and read his rights. He was taken back to the detachment, and at that time he did not wish to provide breath samples and he was lodged in cells until sober.

In terms of damage, Your Honour, I have some estimates of the damage that was caused by these incidents. I intend to file them.

I have an estimate in relation to the Subaru that was taken. I'd like to file that as Exhibit 1. My friend has copies of these, Your Honour. And two estimates in relation to the damage that was done to the boat-trailer. It's two separate estimates, but around the same damage.

THE COURT: Exhibits 1 and 2.

EXHIBIT 1: AN ESTIMATE RE. SUBARU.

EXHIBIT 2: TWO ESTIMATES OF DAMAGE TO BOAT/TRAILER.

MS. AITKEN: And, as well, the estimate for the damage for the body and mechanical repairs to the 1987 Plymouth van.

THE COURT: Exhibit 3.

EXHIBIT 3: AN ESTIMATE RE. 1987 PLYMOUTH VAN.

MS. AITKEN: Your Honour will see from those estimates that

the damage to the Subaru was in the amount of thirty-two hundred and ninety-six dollars and forty-eight cents; the damage to the boat-trailer, one estimate is for seven twenty-two ninety, but one estimate is for six hundred and fifty dollars.

THE COURT: Let's call it seven hundred, then.

MS. AITKEN: Yes, Your Honour.

And the last estimate, Your Honour will see there are two pages for that estimate; there's an estimate for body repairs and an estimate for mechanical repairs. I believe the total comes to thirty-six hundred and three dollars and nine cents for that vehicle.

Your Honour, those are the circumstances of that offence.

THE COURT: Are they admitted?

MR. SPAULDING: Yes, Your Honour, the circumstances respecting Mr. Wilcox's conduct are admitted.

As my friend indicated, he was highly intoxicated; in fact, he advises that he doesn't recollect anything from the point of getting into the Subaru vehicle.

With respect to the estimates of damage, I am anticipating that my friend will be seeking an order for compensation under Section 653 of the Criminal Code, and I want to make my position clear with respect to the admission on the estimates.

Mr. Wilcox admits that the Crown has obtained these estimates of the damage and has no contrary evidence. He is prepared to be sentenced, apart from the question of

compensation, as though this, in fact, is a true record of the property damage. For the purposes of Section 653 of the Code, at this point, I am opposing the request by my friend and not admitting -- and, again, without having any contrary evidence -- not admitting that these are sufficient to prove the damages for the purposes of that section.

MS. AITKEN: Your Honour, I would suggest that perhaps we could get into that when we discuss the 653 order. As I understand my friend, he is prepared to admit that this was the damage that was caused by Mr. Wilcox -- of a total, by my calculations, of seventy-five hundred forty-nine dollars and fifty-seven cents.

THE COURT: All right.

MS. AITKEN: On sentencing, Your Honour, the Crown alleges a record.

MR. SPAULDING: The record is admitted.

MS. AITKEN: Your Honour, prior to going into my submissions, I would ask that Section 238(5), which I believe is count 1, be withdrawn on that information.

THE COURT: Thank you.

MS. AITKEN: And I believe, as well, Your Honour, from the circumstances that were read in that the mischief charges were in relation to the damage that was caused to the vehicles in question by smashing into the boat and also into the Plymouth.

Your Honour will see from Mr. Wilcox's record that in the past he was dealt with as a young offender, that he has several

related convictions for theft and, in particular, he has three convictions for taking auto without consent, his most recent convictions being in April of 1986, at which time he received a custodial term which, in my submission, shows that they were treated very seriously by the Courts at that time, and they must have been very fairly significant offences as he did receive a fairly lengthy period of incarceration, being two months secure custody followed by eight months open custody.

SUBMISSIONS ON SENTENCING BY MS. AITKEN:

MS. AITKEN: In terms of sentencing here today, Your Honour, you have heard the circumstances that on July 11th, this accused was involved in a Section 295 offence. Again, there was damage caused there, in that there were accidents; however, unfortunately, we don't have an estimate for that so I cannot advise Your Honour how much damage was caused, but clearly there was property related damage that occurred from this accused's actions.

THE COURT: When was this, again?

MS. AITKEN: That was the July 11th matter that we're sentencing today.

Your Honour, I can advise, as well, that since Mr. Wilcox was arrested on September the 12th, he has been in custody. It would have been a reverse onus situation, but as I understand it, Mr. Wilcox consented to remain in custody and has been in custody since he was arrested. However, Your Honour, if Your Honour notes from the information on the

July 11th offence....

THE COURT: A summons was served on him in August, before the September offence, was it?

MS. AITKEN: Yes, Your Honour, and he did fail to appear on September the 1st, at first, and then I understand he later showed up, the warrant was cancelled, and they put it over to September the 8th. On September the 8th, a guilty plea was entered, and it was put over for facts and sentencing to the 22nd of September. And, what I would suggest is very aggravating is, four days after Mr. Wilcox appeared in court on the Section 295 offence, he commits another similar offence and, in my submission, obviously a much more serious offence, since he is intoxicated on that occasion and causes significant property damage.

Now, what I would suggest is very aggravating here, of course, as well, is the fact that from the circumstances that Your Honour has heard, it's clear that Mr. Wilcox was a danger to the public. Fortunately, it would appear, due to the time, perhaps, that there was no one on the road and no one was injured, but clearly from the circumstances, there was a great potential for danger here due to his intoxication and the manner of his driving, in going down the street and bumping into vehicles or smashing into vehicles that are parked on the side of the road in a legal position. And, clearly, the force of the impact must have been great to cause the damage that we've heard of today, especially to the 1987 Plymouth van that was parked legally on the street.

And we see that there is some thirty-six hundred dollars damage to that van.

Now, from this accused's record....

THE COURT: Breaking the wheel right off the Subaru?

MS. AITKEN: Yes. So, clearly, the impact must have been great for him to have hit that van, caused it to go up over the kerb and then himself go up over onto a residence lawn and then continue on his way. That didn't even stop him when he'd lost one of the wheels; he still continued on his way. And it wasn't until the vehicle, in fact, stopped of its own accord, probably due to the damage that he'd caused, that he actually got out of that vehicle. So, as I mentioned, fortunately, it was at a time that there were not many persons on the road, it would seem, because clearly there would have been a great potential for injury here if there had been.

Now, it would appear from Mr. Wilcox's record that this is his first time as an adult before the Court; however, in my submission, the circumstances here and this accused's previous young offender record warrants a term of imprisonment.

In my submission, Mr. Wilcox has shown a clear disregard for the Court, in the fact that, as I mentioned, he commits much more serious offences while he's awaiting disposition, just four days after he appeared in this Court and pled guilty to a similar offence.

Now, I would be suggesting, Your Honour, that a term of imprisonment is warranted, both to deter Mr. Wilcox from committing further offences, because it is clear from his

record that in the past, at first he was treated leniently, with probation, but then clearly the Court went into imposing custodial terms, and that did not deter him, so I would be suggesting a term of imprisonment is warranted to deter Mr. Wilcox and hopefully others, to satisfy the principles of general deterrence, of letting others know that this type of offence will be treated very seriously by the Court.

Your Honour will see from Mr. Wilcox's record that he also has a previous impaired conviction, being in October of 1985, so it's not the first time that he has appeared before this Court, in terms of that sort of offence.

I would also be suggesting, Your Honour, that a term of imprisonment is warranted for the protection of the public from these sorts of property related offences. As we can tell from this individual's record and from the circumstances that are before the Court, it is clear that this individual has a clear propensity for committing property related offences. It would seem that that is the majority of his record.

Now, as my friend mentioned earlier, I would be asking Your Honour to consider imposing some sort of restitution as part of the sentence today. Now I suggest my friend will likely tell you that this accused has no ability to pay and so that perhaps a restitution order as part of the probation would not be helpful, as he does not have the ability to pay. First off, I would be seeking that restitution, but if, as my friend mentions, that is the case, I would be suggesting to Your Honour that it would be appropriate to order a

compensation order under Section 653 of the Criminal Code. The cases that deal with that section also talk about the fact that the ability to pay is not really the consideration; it's the consideration of, is it a proper method of not only rehabilitating Mr. Wilcox, as being part of his sentence -- the fact that he has committed all of this damage and caused property loss to a great number of people, that part of his rehabilitation should be to pay that back, and I would suggest by a compensation order under Section 653. And I understand my friend may make an issue of this, Your Honour, but I am appearing as agent for the aggrieved persons, and the aggrieved persons are the people that I have mentioned that the estimates have been for: Cindy Morris, who is the owner of the Subaru; and Mrs. Devitt, the owner of the trailer; and Ann Verkerk, who is the owner of the Plymouth van. Now, I would be appearing as their agent, Your Honour, to ask for the compensation order pursuant to that section. In my submission, it would be beneficial to this accused....

THE COURT: I'm sorry. Aren't you asking for compensation for all three?

MS. AITKEN: Yes, Your Honour, and those are the three people, the names that I mentioned, the persons who are aggrieved persons pursuant to that section; they are the victims of this loss. And, in my submission, it would go to the rehabilitation of this individual to have an order from this Court to make that restitution, to hopefully bring home to him that if he causes this sort of loss that he is going to have to pay for

his error in judgment.

And, as well, I would be suggesting that it be appropriate for a Section 653 order, to save the individuals involved from having to go through civil proceedings to -- clearly, if this individual was involved and the estimates are there and it has shown what the damage was, then, in my submission, it would be proper for this Court to make a Section 653 order. And, as I mentioned, the ability to pay that money, I would suggest, is not the consideration under Section 653, as it would be for a restitution order. It's just a way of assisting the victims of property related offences in being able to recover some of that money. Now, if they wish to pursue it, they have to take their civil remedies to pursue it. It would just be an order from the Court saying, you owe these people X number of dollars. And I would be suggesting that that would be an appropriate part of a sentence for this individual, for these offences.

THE COURT: Well, I would think that the fire and theft insurance on the Subaru would cover the damage to the Subaru, and that the P.L. and P.D. on the Subaru would cover the damage to the other two vehicles.

MS. AITKEN: In my understanding, Your Honour, the Subaru -- in fact, the keys, I believe, were in the vehicle at the time, so I believe they are responsible for a deductible. I'm not sure what their deductible is, but I believe....

THE COURT: Well, I'm just wondering if a compensation order might mean that they wouldn't get their insurance money for a

1 while, if ever. Or likely the insurance would pay them what
2 was due and then subrogate it.

3 MS. AITKEN: My understanding of how it would work, Your Honour,
4 is that the insurance would pay and they would be subrogated,
5 so that if this youth paid them the money, they would have to
6 turn it over to the insurance company. But I would be
7 suggesting, Your Honour, that it would be an appropriate
8 sentence, in terms of rehabilitating this person, in terms
9 of making him realize and pay for his error in judgment in
10 this way.

11 Those are my submissions, Your Honour.

12 THE COURT: Mr. Spaulding?

13 SUBMISSIONS ON SENTENCING BY MR. SPAULDING:

14 MR. SPAULDING: Your Honour, Glen Wilcox is 18 years old. He
15 was born in Truro, Nova Scotia. He was adopted into a family
16 when he was three years old, and the family moved to Ontario
17 for a couple of years, and he's then moved to Yellowknife and
18 has been living in Yellowknife since he was about eight years
19 old.

20 He has had a difficult family life. His adoptive father
21 and mother separated when he was very young, I believe when
22 the family was still in Ontario. His mother then remarried
23 to his present stepfather, and that couple separated five
24 years ago; that would have been when Glen was about thirteen
25 years old. Since then, Glen has been living, for the most
26 part, with his stepfather in Yellowknife, and the mother has
27 been in Edmonton, Alberta. It hasn't been an easy relationship

between the boy and the stepfather.

The boy did attend school until the end of the 1985/86 year end, and he was in Grade 9 at Sir John Franklin High School at that time, so that he does appear to have some aptitude in school. He has obtained periodic employment over the last two years, including during his time at the Salvation Army open custody facility, last year. That employment includes a month of working at P.P.T. Mechanical in a labour job, another month working for Char Construction, here in Yellowknife, doing carpentry work and assisting carpenters; and another month working at the Yellowknife Inn, as a dishwasher.

I have indicated that the relationship with the stepfather has not been an easy one. After his release from the Salvation Army in the spring of 1987, Mr. Wilcox stopped living with his father for some time and went to live with his sister in Edmonton for about five months. He wasn't able to find work in Edmonton, and he moved back to Yellowknife. The July 11th offence occurred the evening after his father told him that Glen couldn't stay with the stepfather any longer.

I have spoken to the stepfather, Mr. Fleury, the owner of the vehicle in that incident, and he indicates that he felt that Glen was not coming in at night when he should have been and that, at that time, he wasn't prepared to have Glen stay with him any longer. And the stepfather was also concerned with Glen Wilcox's drinking.

Glen recognizes that he has an alcohol and drug problem; in fact, he feels that he has beat the drug problem that he was suffering from a few years ago. He attended Narcotics Anonymous in Yellowknife regularly, until he stopped taking drugs about one and a half years ago, but he does still drink from time to time. He says that he drinks quite heavily about twice a month now, and he also indicates that at times, he drinks so much that he can't remember what's happened afterwards and doesn't know what he's doing at the time. And that is what he says happened on September the 12th, when he went on this rampage on Forrest Drive and in the School Draw area.

With respect to his plans, he plans to finish school. He wishes to obtain his Grade 10 through upgrading courses, which are available; he needs Math, Science, Social Studies and English. And then he hopes to go to Thebatcha College for training as a carpenter.

He is active in sports in Yellowknife. He plays hockey regularly. Last year he played on a midget team, and there is no juvenile level team in Yellowknife, so he is hoping to get on in a rec league team this season, if he can get on a team. He also fishes and camps regularly. He often goes out during the summertime with his friends on weekends.

With respect to the record, he indicates that although not all of the offences are alcohol related, most of them are.

As my friend has pointed out, Your Honour, this is the first time that Glen Wilcox is before the Court as an adult.

The previous record is entirely a juvenile record. My submission on that point, Your Honour, is that while the juvenile record is not at all to be disregarded, Mr. Wilcox now faces much heavier sanctions. He's only too well aware of that, having spent time in remand now for the last fourteen days and, in my submission, the Court should not view those past offences as though they were adult offences. There is some consideration to be given for lesser responsibility, as a young offender, and fewer sanctions, when offences were committed as a young offender.

With respect to the September 12th incidents, I have pointed out that Mr. Wilcox was not aware of what he was doing at the time. I don't say that that's a great mitigating factor, because he has drunk before and done things like this, so he certainly should have been aware of that potential when he started drinking. Unfortunately, he had just before that time, started to make amends with his stepfather, who had taken him back into the home only a couple of nights previously, and Glen had also started going to an alternate school in Yellowknife, with his father's encouragement. There is a school in Yellowknife called Project Change, which takes kids who have had difficulty in the regular school system. And he had been there for two days -- it's not a very long period of time to judge by -- but the father felt that he was doing quite well there. I have spoken to one of the instructors there, who confirms that Glen was, in fact, in attendance there and they felt that he seemed to be fairly

keen in pursuing his studies.

With respect to the appropriate disposition, Your Honour, I don't say that imprisonment is not appropriate. I accept my friend's submission that both for specific deterrence, given the record, and for general deterrence, some period of imprisonment is appropriate. I would submit that a reasonably short term of imprisonment -- given the fact that he has spent fourteen days doing hard time in remand, half of that time after the plea was entered, and given the fact that this is the first time that Glen Wilcox is in the real world of adult correction facilities, that a very lengthy term would not serve him and may, in fact, dull the deterrent aspect of the sentence.

In my submission -- and I believe my friend has no opposition to this -- the range of three to six months, which would not be appropriate if this were an older and more seasoned offender committing the same offences, is a range that the Court might consider in this situation.

I would also ask the Court to take account of the fact that Mr. Wilcox has entered guilty pleas on these offences at the first opportunity. That, in itself, I would submit, indicates some sense, while sober, of responsibility on Mr. Wilcox's part. It also, of course, saves the Court and the judicial system great expense and time.

Next, Your Honour, I have submissions to make on the question of compensation. My first submission is that the application for a compensation order is required by the terms

of Section 653.(1) of the Code, to be made by the person aggrieved. Now, I understand my friend will be taking the position that the Crown apparently often speaks on behalf of persons aggrieved in seeking this type of order, but in my submission, the words of the Code are clear: there should be either a written application by the person aggrieved or a personal application in Court.

Now, my friend has said that she appears as agent. I am not aware of what the basis of that agency is. I doubt that the position is that she is acting as solicitor in a private capacity for those persons, and if that were the case, then perhaps it would be appropriate to have that person appear through their solicitor. But if that were the case, I would submit that there is some inconsistency between Crown counsel representing the public interest, speaking to sentence, and also, at the same time, appearing in a private capacity.

The policy behind that requirement, in my submission, is fairly understandable, and that is that if the victim is concerned enough to seek compensation in this rather extraordinary part of the Criminal Code, then they ought to come forward and make the application, themselves. If they are not insured or if their deductible is high enough that they are concerned that they are going to be hit quite hard personally, then that is an option open to them. In this case, we don't have any clear evidence of whether there is a significant deductible that's not going to be covered by insurance or, in fact, how the insurance would operate.

But we do know that of the trailer and the two vehicles, the trailer, itself, being accountable for seven hundred of the amount included in the estimates, the two vehicles are required by law to be insured.

THE COURT: Well, P.L. and P.D.

MR. SPAULDING: Yes, certainly. I take your point with respect to the Subaru, Your Honour, that the --

THE COURT: No, but the van doesn't -- it has P.L. and P.D., but it doesn't help it any.

MR. SPAULDING: Sure, all right. But, again, Your Honour, we don't have the facts before the Court. We have a 1987 Plymouth van, which, I would suggest, if one had to speculate -- and we shouldn't be -- but if one had to speculate, one would guess that the owner had it insured for the full value of the van. But that information is not before the Court.

THE COURT: I have two cars; one is insured for collision and with the deductible that is compulsory with our insurance company; the other has no insurance. And we can't infer that this van has any collision insurance, has any insurance on it that would cover this situation.

MR. SPAULDING: Well, I suppose perhaps I'm venturing into an area that I needn't. In my submission....

THE COURT: In any event, it's sort of going behind a veil that, I suppose, is none of our business. I only raised it because of the fear that the restitution order or compensation order might prejudice the victim's ability to get insurance, payments from the insurance companies.

1 MR. SPAULDING: Well, in my submission, Your Honour, the
2 insurance situation is appropriate to the making of the order.
3 It's a discretionary order, and the Court should know what
4 impact precisely this order is going to have on the persons
5 aggrieved, not the insurance company, but the persons
6 aggrieved.

7 My second submission, apart from the first one, which is
8 that there is basically no jurisdiction in the Court to make
9 an order where there isn't an application by the person
10 aggrieved, my second is that for several reasons, the order
11 would not be appropriate in the circumstances. The first
12 circumstance that I would draw the Court's attention to is
13 the age of the accused and his background and future prospects.
14 This is a young man who has some work history, not a long
15 work history, an unfortunate personal background, but he
16 appears to have some goals, although he is, perhaps, some
17 distance from reaching them. But he has gone back to school,
18 he has worked from time to time, even though he was in an
19 open custody facility, but he doesn't have any means of his
20 own, he has no property, to speak of. In my submission, the
21 effect of the compensation order on an eighteen year old
22 person in this circumstance would be crushing.

23 Now, my friend pointed out that, I believe in her words,
24 the compensation order would not be the end of it; the
25 persons aggrieved would have to pursue their civil remedies.
26 Well, just to clarify that, Your Honour, Section 653.(2) of the
27 Code provides that the order, itself, simply has to be filed

in the Supreme Court, and presumably in the Sheriff's office and the registries that are ordinarily used, and it has effect as if it were a civil judgment. So, this order can be used as the basis for a sheriff's seizure or a garnishee without any difficulty about filing it in the appropriate office.

I submit that given that effect, that what we are dealing with is what may very well be a great deterrent to this person becoming self-sufficient. When he first gets his regular job, supposing he does become a carpenter and he starts earning fourteen, fifteen dollars an hour, if the person really wants to collect on this amount, they simply file it, not having gone through civil proceedings. Quite possibly, whether it be them personally or their insurance company, had they had to go through civil proceedings, they would have said, this person is not collectible, we cannot do anything, it is not worth our while to take this step. But since the Criminal Court is willing to do something, here we have the paper, and he has a very serious deterrent.

The next circumstance which I rely upon as making the order inappropriate in this situation are some aspects of the estimates, themselves. I have taken the position, Your Honour, that I don't admit the figures as being determinative for the purposes of this section.

I would point out, particularly with respect to the Subaru, that we have a nine year old vehicle with an estimate of damage of approximately thirty-three hundred dollars, which

does not include, as does, for example, the estimate of the trailer, what the replacement value of this vehicle really is. For all we know, the Subaru is worth fifteen hundred dollars. No information is before the Court on that item. Whereas for the trailer, we had a replacement value estimated in one of the two estimates, in any event, which indicates that the replacement value is almost double the amount of the repairs. That's on the estimate of seven hundred and twenty-two dollars and ninety cents.

I suppose, to summarize my submissions on the appropriateness of the order, Your Honour, it is my submission that this order is not intended to have the Criminal Courts act as a convenient form of collection agent on behalf of private persons. Now, that does, as I understand it, form at least a significant part of my friend's submission. I believe she made the submission that by making the order, you would, in effect, assist them to obtain their relief without having to go through civil proceedings. In my submission, that is not a part of the purpose of this section.

THE COURT: What is the purpose of the section, then?

MR. SPAULDING: I have one case on the point, Your Honour. It's a Supreme Court of Canada decision, and perhaps this would be an appropriate time to deal with that. I had some very lengthy decisions, though. I'll provide Your Honour with a copy of the volume of the Canadian Criminal Cases where it's reported; that's volume 41 (2d). And I have marked the three pages where Justice Laskin, speaking for the majority, reviews

the purpose of the section and the circumstances in which it should be resorted to. And they start at page 111, Your Honour, from page 111 to 114.

I won't refer to the remainder of that case, Your Honour, because it's primarily a constitutional case. The section, when it was first enacted, was challenged on the basis that it really wasn't a criminal sanction, it was within provincial jurisdiction, as being part of their jurisdictional or part of their civil rights.

THE COURT: I think it's referred to in Martin's--

MR. SPAULDING: Yes, it is, it's the first case referred to in Martin's.

THE COURT: -- for that purpose.

MR. SPAULDING: At page 111, about two-thirds of the way up the page, the reasons of Justice Laskin make the first point, the first point that I wish to draw from this passage and the last that I wish to make in my submissions, which is: if the Court is to consider this compensation order, at all, it must consider it as part of its sentence; it should not see it as something independent of and for the sake of the victims, alone. It is part of the punishment of the offender, and it is part of the denunciatory aspect of the sentence.

Justice Laskin says that:

"The constitutional basis of Section 653...."

And that is the criminal basis, which he has just found to be supportive of the section --

"....must, in my opinion, be held in constant view by a Judge called upon to apply its terms. It would be wrong, therefore, to relax in any way the requirement that the application for compensation be directly associated with the sentence imposed as the public reprobation of the offence."

The purpose is public reprobation. People feel, the public feels that victims of crimes should be compensated, and that is justifiable as a sanction of the criminal law, but it is public reprobation which is the primary purpose. To reinforce that, in the fourth line from the bottom of the page, one of the factors that Justice Laskin says the Court should consider in exercising what is a discretionary order is:

"....whether the aggrieved person is invoking Section 653 to emphasize the sanctions against the offender" (which is the legitimate purpose) "as well as to benefit himself."

And it's the sanctions against the offender which the Court is emphasizing as being a factor in support of the order.

Next, at page 112, at the top of the page:

"There are other factors that enter into the exercise of the discretion such as the means of the offender...."

And, in my submission, certainly with respect to the amount sought, the means of the offender before the Court today are enough to dissuade the Court from making the order. And my friend made reference to case law which said that the means don't count, and I take it that she was referring to the Scherer decision annotated in Martin's on page 648. But that decision is a special case, in my submission. What the Court said there is that:

"...inability to pay a large compensation order

"is not determinative against an order under this section as where the making of such an order is the most expeditious way for the victim to fulfill a pre-condition entitling them to compensation from another source, in this case the Law Society Compensation Fund."

So, in that case, where there were special circumstances where the victim did not....

THE COURT: Where was this?

MR. SPAULDING: That's on page 648 in Martin's. It's just an annotation, and it's the case of R. vs. Scherer, a decision of the Ontario Court of Appeal, leave to appeal the Supreme Court of Canada.

THE COURT: Oh, I'm sorry, I'm looking at the brand-new Code. It's at page 670 now.

MR. SPAULDING: Yes. In my annotation, it's the third case annotated.

THE COURT: R. vs. Scherer, yes.

MR. SPAULDING: In any case, my submission is that that case does not say the means don't count, but simply says that there are some circumstances in which the Court might consider making an order beyond the means. But the Supreme Court of Canada has said in Zelensky that the means do count. And, in my submission, an impecunious offender should not be given an order in the neighborhood of this one, which would have a crushing impact on his ability to support himself in the future.

Lastly, simply to summarize, in the words of Justice Laskin, what all of this comes to is, and I'm quoting from page 112:

"...an order for compensation should only be made

"with restraint and with caution."

Now, I don't say, Your Honour, that the facts in this case are on all fours or even very similar to those in Zelensky. That case involved fraud and the complainant was Eaton's, and Eaton's appeared to be trying to have its cake and eat it, too, by taking civil action and getting to the point of discovery and then leaping into Criminal Court and trying to get an immediate order, when, in fact, the amount was very difficult to ascertain and very much disputed.

Here we have property damage, which I accept is not nearly as difficult to ascertain as it might be in the case of a fraud case, which involves interpretation of documents. But, nonetheless, the means of the offender and the circumstances which I have outlined, in my submission, suggests that an order certainly of anything like this magnitude is not appropriate in these circumstances.

My friend also submitted that a compensation order would be suitable for the rehabilitation of the offender. In my submission, that is not the case, given the quantum, although a moderate amount of restitution in the neighbourhood of what the Court would consider as a fine, given the means of this offender, would be appropriate. I would accept that.

Those are my submissions, Your Honour.

(AT WHICH POINT THE COURT GAVE REASONS FOR SENTENCE)

(PROCEEDINGS CONCLUDED)

Certified a correct transcript,

Debora Chippefield
Debora Chippefield, Court
Reporter